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# UNITED STATES

# MINERAL LANDS;

## LAWS GOVERNING THEIR

# OCCUPANCY AND DISPOSAL;

DECISIONS OF

FEDERAL AND STATE COURTS IN CASES ARISING THEREUNDER;
AND REGULATIONS AND RULINGS OF THE LAND
DEPARTMENT IN CONNECTION THEREWITH,

WITH

## MISCELLANEOUS MATTER.

BY HENRY N. COPP.

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# PREFACE.

## REVIEW OF FEDERAL LEGISLATION.

The motive underlying the earliest Congressional legislation touching the public mineral lands was to secure a revenue therefrom. To this end the system of leasing the lead and copper mines was adopted in 1807, with its attendant agencies, accountings, etc. After a trial of nearly forty years the system was pronounced a failure, and in 1846 the mines were offered at sale, with a preference right in those who had leases or were in the occupation of the mines. When the gold mines of California were discovered, and the varied mineral wealth of the Pacific coast was brought to the attention of Congress, several revenue bills were introduced, at different times, and earnestly debated. But the notorious failure of the lease system in the Mississippi Valley, and the difficulties in the way of securing a revenue otherwise, gave success to the friends of free mining in 1866.

Except in a few States, the object of Congressional legislation, since 1866, has been to prevent the disposal of mineral lands to States and railroads, or in large quantities to individuals. Exploration of hidden mines is encouraged, and no efforts are used to compel miners to expend money in securing government title. The mining law of May 10, 1872, is essentially a poor man's law, and has been the source of incalculable wealth to the country, and indirectly of vast revenue to the government.

### I.—RESERVATIONS.

**Continental Congress.**—The ordinance of the Revolutionary Congress of May 20, 1785, reserved "one-third part of all gold, silver, lead, and copper mines, to be sold or otherwise disposed of as Congress shall hereafter direct." And in the grant or patent prescribed by the act, the wording is "excepting and reserving one-third part of all gold, silver, lead, and copper mines within the same for future sale or disposition." (Public Lands, &c., Part I, 13, 14: Yale, 325.) This ordinance continued in force until the Constitutional Congress in 1789.

**First Congress.**—The plan for the disposition of the public lands reported by Alexander Hamilton in July, 1791, is silent on the subject of mineral lands. (1 American State Papers, 4, 5.)

**Lead Mines.**—In many instances from 1807, where land was authorized to be sold in particular sections of the country, lead mines were reserved from sale; and by the act of March 3, 1807, the leasing of lead mines for a period not exceeding five years was authorized, and a grant of land containing a lead mine, discovered before the sale, was declared to be fraudulent and void. In United States *vs.* Gratiot (14 Peter, 526,) the Supreme Court held that Congress has the power to lease as well as to sell the public lands. By the act of March 3, 1849, the powers of the Secretary of the Treasury over lead and other mines were transferred to the head of the Home (Interior) department created by that act.



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**Pre-emption Laws.**—The tenth section of the general pre-emption law of 1841 excluded from its operation "all lands on which are situated any *known* salines or minerals." In nearly all the pre-emption acts prior thereto minerals were reserved. In the several pre-emption acts relating to California special care seems to have been taken to prevent the appropriation of mineral lands by settlers. The act of July 23, 1866, to quiet land titles in California, further protected mineral lands in that State. The Oregon donation act also excluded mineral lands from its operation.

**Railroad Grants.**—In the earlier grants to aid railroads mineral lands are not mentioned in terms; a general clause is inserted excepting all lands reserved for any purpose or by any act of Congress. In the renewal of the railroad grants in Alabama, by act of April 10, 1869 (16 Stats. 45,) mineral lands are excluded. In the grant in aid of the Iron Mountain and St. Louis Railroads, (July 4, 1866, 14 Stat., 83,) mineral lands not coal and iron are excepted. In this latter form the mineral lands have, since 1864, been excluded from railroad grants in the mining States and Territories.

The acts of July 1, 1862, and July 2, 1864, which donated nearly 100,000,000 acres to railroad corporations, gave the coal and iron lands within their limits, but excepted other mineral lands from the grants.

In the act of July, 1862, the following is the excepting clause: "*Provided*, That all mineral lands shall be excepted from the operation of this act: but where the same shall contain timber, the timber thereon is hereby granted to said company."

In the act of July 2, 1864, section 4 contains this language: "* * And the term 'mineral land,' wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation, or mineral lands, or the improvements of any *bona fide* settler or [on] any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, to be ascertained under such rules as have been or may be established by the Commissioner of the General Land Office, in conformity with the provisions of the pre-emption laws: *Provided*, That the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said Commissioner may establish by general regulation: *Provided also*, That the phrase 'but where the same shall contain timber, the timber thereon is hereby granted to said company,' in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act, or in this act."

**State Grants.**—In the earlier Congressional grants of land to States, minerals were not mentioned in terms. A general exception was made of all reserved lands. In the river improvement grants in Iowa and Wisconsin, there was no reservation of mineral lands, but in the grants

to aid the ship canals in Michigan (March 3, 1865, April 10, 1866, and July 3, 1866) mineral lands were excluded.

The internal improvement, swamp, and educational grants do not mention mineral lands until after 1860, so far as observed. The agricultural college act of July 2, 1862, excluded "mineral lands."

In the acts admitting States to the Union, mineral lands, as a rule, are not particularized. Only in those States notoriously rich in minerals, like California, are the mineral lands noticed prior to 1860.

### II.—TRESPASS.

Digging for minerals on the public domain, prior to the act of July 26, 1866, was a trespass, entitling the government to damages, and was such a waste as could be restrained by an injunction.

**The Illinois Lead Case.**—Upon the construction of the fifth section of the act of March 3, 1807 (2 Stats, 448) and the act of June 26, 1834, (4 Stats. 686,) the Supreme Court decided the case of Gear, holding the defendant guilty of trespass in mining for lead upon the public land in Illinois, and enjoining him from the commission of waste. (3 How., 120.)

The case of Gear was affirmed in Cotton *vs.* The United States, (11 How., 229,) where the principle was extended or applied to an action of trespass for cutting timber upon the public land. As the owner of the land, it was the government's right to protect its property in the same manner as an individual would. On these questions the inquirer may consult U. S. *vs.* Schuler (6 McLean, 28.)

**The New Almaden Quicksilver Case.**—An implied license from the government to mine upon the public land by reason of its indulgence, if not direct encouragement, was denied in the case of the United States *vs.* Parrott, involving title to the New Almaden mine in California. (See U. S. *vs.* Castillero, 2 Black's Supreme Court Reports for 1862, wherein this mine was also involved.)

In Sparrow *vs.* Strong (3 Wallace 104), the U. S. Supreme Court recognized the local mining rules.

### III.—FREEDOM AND SALE.

The act of July 11, 1846, (9 Stats., 36,) authorized the sale of the reserved mineral lands in the States of Illinois and Arkansas, and the Territories of Wisconsin and Iowa, but still excepted the lead mines from pre-emption. The reserved mineral lands in Missouri had shortly before been offered at sale. This act acknowledged the failure of the lease system. In the following year (1847) the mineral lands in Michigan were offered at sale. The act of September 26, 1850, apparently ended the distinction between mineral and agricultural lands in Michigan and Wisconsin. It enacted that the mineral lands therein "shall be offered at public sale in the same manner and be subject to the same minimum price and the same rights of pre-emption as other public lands of the United States."

The act of July 26, 1866, threw open the mineral lands of the United States to exploration and occupation, and it was thereafter no longer a trespass to dig ore or engage in mining operations on the public domain. The acts amendatory of this liberal law, including the Sutro Tunnel grant, will be found elsewhere in this volume.

### OBJECT OF THIS WORK.

This book purports to give the legal status of the mineral lands belonging to the United States at date of going to press. The subject is continued in Copp's *Land Owner*, vol. IX, a monthly publication. Those who desire to follow the development of the mining laws since 1874, the date of Copp's U. S. Mining Decisions, will be able to do so in vols. 1 to 8 of the *Land Owner*, A list of patents for mining-claims, issued to date of publication, can be found in Copp's "American Mining Code."

### ACKNOWLEDGMENTS.

Acknowledgments are due for the valuable suggestions of Curtis W. Holcomb, chief clerk of the General Land Office, and Ellery C. Ford, attorney-at-law, Washington, D. C., formerly head of the mining division of the General Land Office.

# CONTENTS.

PART I.—LAWS.*


| | | PAGE. |
|---|---|---|
| No. 1. | Revised Mining Statutes of the United States | 1 |
| No. 2. | Lode and Water Law of July 26, 1866 | 18 |
| No. 3. | Placer Law of July 9, 1870 | 21 |
| No. 4. | Parallel References, including General Act of May 10, 1872 | 22 |
| No. 5. | Act of February 18, 1873—Michigan, Wisconsin, and Minnesota | 23 |
| No. 6. | Act of March 1, 1873—Annual Expenditure | 23 |
| No. 7. | Act of June 6, 1874—Annual Expenditure | 23 |
| No. 8. | Act of February 11, 1875—Tunnel Amendment | 24 |
| No. 9. | Act of May 5, 1876—Missouri and Kansas | 24 |
| No. 10. | Act of January 22, 1880—Agent—Annual Expenditure | 24 |
| No. 11. | Act of March 3, 1881—Suits at Law | 25 |
| No. 12. | Sutro Tunnel Law of July 25, 1866 | 25 |
| No. 13. | Timber Cutting Act of June 3, 1878 | 26 |
| No. 14. | Timber and Stone Law of June 3, 1878 | 27 |
| No. 15. | Saline Law of January 12, 1877 | 29 |
| No. 16. | Coal Laws of July 1, 1864, and March 3, 1865 | 30 |


PART II.—LAND OFFICE REGULATIONS.†


| | | |
|---|---|---|
| *a.* | General Circular under Revised Statutes | 31 |
| *b.* | Definition of Rock in Place and Valuable Mineral Deposit | 50 |
| *c.* | Hearings to Determine Character of Land | 53 |
| *d.* | Surveys | 58 |
| *e.* | Annual Expenditure | 64 |


* For a brief Review of Federal Legislation on Mines and Mineral Lands, see Preface.

Coal Law of March 3, 1873, is included in Revised Statutes—Also see Parallel Reference.

† For circular instructions issued prior to those herein given, but now obsolete or embraced in later regulations, see COPP'S U. S. MINING DECISIONS, as follows:

January 14, 1867—General—p. 239.
June 25, 1867—Supplemental to above—p. 245.
May 16, 1868—Pre-emption and Homestead Claims—p. 248.
July 25, 1870—Fees—p. 251.
August 8, 1870—General—p. 253.
May 6, 1871—Hearings—p. 261.
August 8, 1871—Citizenship—p. 267.
September 7, 1871—Citizenship—p. 267.
March 26, 1872—Citizenship—p. 268.
June 10, 1872—General—p. 270.
November 24, 1871, *et seq.*—Segregation of Agricultural Lands—pp. 297 to 315.

PAGE.
*f.* Stone and Timber Lands ..... 65
*g.* Saline Lands ..... 68
*h.* Coal Lands ..... 69

PART III.—LAND DEPARTMENT RULINGS.

*a.* Under the General Minings Laws ..... 74
*b.* Salt Springs and Deposits ..... 333
*c.* Coal Lands ..... 337

PART IV.—JUDICIAL DECISIONS.

*a.* In Full ..... 347
Flagstaff Silver Mg. Co. *vs.* Tarbet ..... 347
Eureka Cons. Mg. Co. *vs.* Richmond Mg. Co. ..... 352
Richmond Mg. Co. *vs.* Eureka Cons. Mg. Co. ..... 365
North Noonday Mg. Co. *vs.* Orient Mg. Co ..... 370
Jupiter Mg. Co. *vs.* Bodie Cons. Mg. Co ..... 381
Erhardt *vs.* Boaro ..... 394, 395
Crossman *vs.* Pendery ..... 399
Iron-Silver Mg. Co. *vs.* Cheeseman ..... 400
Belk *vs.* Meagher ..... 402
Van Zandt *vs.* Argentine Mg. Co ..... 410
Campbell *vs.* Rankin ..... 413
Johnstone *vs.* Robinson *et al* ..... 416
Harris *vs.* Equator Mg. and Smelting Co ..... 419
Spiegelberg *vs.* Clark ..... 421
St. Louis Smelting and Ref. Co. *vs.* Kemp ..... 424
Flagstaff S. Mg. Co. *vs.* Cullins ..... 438
Kahn *vs.* Central Smelting Co ..... 440
420 Mg. Co. *vs.* Bullion Mg. Co ..... 444
Leadville Mg. Co. *vs.* Fitzgerald ..... 452
Stevens and Leiter *vs.* Murphy ..... 452
Tabor *vs.* Dexter ..... 453
Gold Hill Quartz Mg. Co. *vs.* Ish ..... 454
Ivanhoe Mg. Co. *vs.* Keystone Cons. Mg. Co ..... 458
Heydenfeldt *vs.* Daney G. and S. Mg. Co ..... 464
Forbes *vs.* Gracey ..... 468
Jennison, executor of Titcomb, *vs.* Kirk ..... 471
Morton *vs.* State of Nebraska ..... 478
*b.* By Digest ..... 488

PART V.—MISCELLANEOUS.

*a.* Forms ..... 527
*b.* Glossary ..... 548
*c.* How to Examine Title ..... 586
*d.* Public Land Commission's Codification ..... 590

# LIST OF NAMES.

## INDIVIDUALS, CORPORATIONS AND CLAIMS.


PAGE.

Actæon Lode..... 394
Adams, Campbell *vs.*..... 599
Adams M. Co. *vs.* Senter..... 491
Adelaide Consolidated S. Mg. & Smelting Co..... 246
Adelaide Lode.....245, 410
Aduddell Lode..... 177
Ahly *vs.* Garrison..... 492
Ah Woo..... 188
Ah Yew *vs.* Choate...509, 514, 590, 591, 602
Aiken *vs.* Buck..... 491
Aiken *vs.* Watson..... 440
Alberbury, Rex *vs*..... 509
Aldrich, Wm..... 85
Alexander, A. J..... 171
Alford *vs.* Barnum .....510, 590, 591, 602
Alger Lode..... 84
Allison, William..... 402
All Right Mine..... 543
Alpha G. & S. M. Co., McCurdy *vs.*. 495
Alvord, Davis *vs.*..... 439
Amador City, Townsite of, *vs.* State of California..... 101
American Flag G. Mg. Co..... 255
American Flag Lode..... 255
American Hill Quartz Mine..... 237
American Mg. Co., Overman S. M. Co. *vs*.....492, 507, 593
Anderson, Hoofnagle *vs*..... 429
Anderson, R. T..... 155
Anderson *vs.* Simpson..... 490
Anderson, W. C..... 117
Anglo-California Bank, Mahoney Mg. Co. *vs*..... 494
Angwin, R. H..... 119
Antelope *vs.* Highland Chief..... 162
Antelope Lode.....162, 204
Antonie Co. *vs.* Ridge Co..... 595
Appleton, D. S..... 543
Arey, J. P..... 92
Argentine Mg. Claim ..... 318
Argentine Mg. Co., Van Zandt *vs*..... 410
Arnold, Wm. A.....161, 179, 182
Aspinwall, Lloyd..... 97
Aspinwall Lode..... 283
Atchison *vs.* Peterson.....478, 602
Atherton *vs.* Fowler..... 407

PAGE.

Atkins *vs.* Hendree.....498, 506, 593, 595
Atlas M. Co. *vs.* Johnston..... 491
At Last Claim..... 360
Attorney-Gen. *vs.* Mathias..... 497
Attorney-Gen. *vs.* Smith..... 510
Attwood *vs.* Fricot.....415, 516, 517, 518, 593, 595
Augustine, J..... 86
Aukram, E. V..... 160
Aukram, W..... 160
Ayers, Geo. R.....159, 202
Bacigalluppi, Rowe *vs*..... 595
Bacon, Hardenbergh *vs*...491, 495, 593, 595
Bagnall *vs.* Broderick.....429, 430
Baker P. T..... 218
Baldwin, Barry..... 190
Baldwin, Osterman *vs*.....158, 193, 292
Balenger, H. G..... 254
Baltimore Lode..... 315
Bank of Penn. *vs.* Gries ..... 440
Barcroft, Craig *vs*..... 521
Barnard, Faxon *vs*..... 503
Barney *vs.* Dolph.....241, 265
Barnum, Alford *vs*.....510, 590, 591, 602
Barrett, Stoakes *vs*.....478, 590, 591
Barr *vs.* Lewis..... 126
Basey *vs.* Gallagher.....478, 602
Batcheller, J. B..... 218
Batcheller, N. S..... 218
Bateman, I. C.....117, 344
Bates, Geo. C ..... 117
Beach, Jackson *vs.* (See Beech)..... 193
Beard *vs.* Federy ..... 427
Bear River Co., McDonald *vs*..... 478
Bear River Co. *vs.* N. Y. Mg. Co.... 478
Bear River Co., Wixon *vs*....491, 590, 591, 593
Bechtel Cons. Mg. Co., Bodie Tunnel & Mg. Co. *vs*..... 318
Becker, Theodore H.....184, 222, 312
Beckner *vs.* Coates..... 188
Bed Rock T. & M. Co., Bell *vs*...392, 488, 490, 499, 595
Beech, Jackson *vs.* (See Beach)..... 592
Began *vs.* O'Reilly..... 497
Belford, J. B ..... 189
Belk *vs.* Meagher..... 402

PAGE.
Bella Union Quicksilver Mine..... 161
Bell *vs.* Bed Rock T. & M. Co....392, 488, 490, 491, 499, 595
Bell *vs.* Bell..... 491
Bell, Edward..... 116
Bell, Hicks *vs*.....517, 590, 591, 594
Bellwether Lode..... 133
Benedict, E. A..... 317
Bennett Lode..... 255
Bennett, Mahoney M. Co. *vs*..... 500
Berryhill, Corbett *vs*..... 511
Berryman, State *vs*..... 513
Bibbins, G. W..... 294
Bigelow *vs.* Wilson..... 126
Big Flat Gold Mg. Co..... 299
Big Flat Gravel Mg. Co..... 299
Billings, G..... 121
Birdsall, G. W..... 449
Bisbee, McKeon *vs.* (See Brisbee).. 498, 511
Bishop, H. W..... 167
Bissell, First National Bank *vs*..... 491
Bissell, Henshaw *vs*..... 171
Black Hills Mines..... 212
Blaine, James G., Lode..... 315
Blair, Montgomery..... 286
Blake *vs.* Butte M. Co..... .....512, 515
Blakey *vs.* Blakey..... 440
Blanchard, Geo. G..... 207
Blasdell, Phillpots *vs*... 495, 512, 520, 594, 595
Bliss *vs.* Kingdom.... .....520, 526
Blodgett *vs.* Potosi G. & S. M. Co... 496, 595
Blue Point Placer..... 257
Boardman *vs.* Reed ..... 429
Boaro, Erhardt *vs*.....394, 395
Boaz Lode..... 315
Bodie Mg. Co., Jupiter Mg. Co. *vs*... 328, 381
Bodie Tunnel & Mg. Co. *vs.* Bechtel Cons. Mg. Co..... 318
Boehmer, Max..... 300
Bogart, Mount *vs*..... 132
Bogert, Griffith *vs* ..... 126
Boggs, F. H..... 315
Boggs *vs.* Merced Mg. Co.....431, 525, 590, 591, 593, 604
Bogy, L. V..... 187
Boles, Thomas..... 82
Bonanza Mg. Co., Iowa Mg. Co. *vs*.. 243, 259
Borax Co., Nevada Cons..... 50
Borden, Wm..... 543
Borg, L. P..... 216
Bosphorous Lode..... 97
Boston Co., Maine Boys Co. *vs*..... 593, 600
Boston H. M. Co. *vs.* Eagle Copper Co..... 320
Boston Mine, McGarrahan *vs*..... 320
Boston Quicksilver Mine..... 206

PAGE.
Boucher *vs.* Mulverhill, (See Bucher) 513
Bower & Co., Jenny Lind Co. *vs*..... 497
Bower, Caldwell *vs*..... 440
Bower, John C..... 79
Bowker, Dalton *vs*..... 478
Bowman S. Mg. Co..... 179
Boyle, Walsh *vs*..... 126
Bradford, Craig *vs*..... 592
Bradford, Marquart *vs*..... 488
Bradley *et al.* on the Rhode Island Lode ..... 84
Bradley *vs.* Lee..... ...508, 593, 595
Bradt, W. H..... 246
Brandon *vs.* Pocotillo S. M. Co..... 512
Brant, Landes *vs*..... 241
Brettell, Rex *vs*..... 509
Brewer, French *vs*..... 495
Bridge *vs.* Underwood.....591, 593
Bright Point Mine..... 216
Brisbee, McKeon *vs.* (See Bisbee.) 456
Britton & Gray..... 122
Britton, Gray & Drummond.. ..... 137
Brockway *vs.* Innes..... 440
Broderick, Bagnall *vs*.....429, 430
Broder *vs.* Water Co.....322, 478
Brophy & Dale G. & S. Mg. Co., Brophy Mg. Co. *vs*.....511, 521
Brown, Alex..... 315
Brown *vs.* Chadwick..... 509
Brown, Davis *vs*..... 415
Browner, Martin & Davis *vs*..... 519
Brown *vs.* '49 and '56 Quartz Mining Co.....508, 593
Brown, J. W..... 293
Brown, J. Warren..... 136
Brubaker, Doak *vs*.....488, 501
Bruné, Francis F..... 135
Brunswick Lode..... 225
Brunswick Mine..... 197
Bryan *vs.* Forsyth..... 330
Bryan, Harvey *vs.* (See Ryan)..... 592
Bryan, T. B..... 313
Bryden, McClinton *vs*..... 478
Bucher *vs.* Mulverhill, 513, 593, 594, 595
Buck, Aiken *vs*..... 491
Buck, B. F..... 155
Buckeye Lode..... 289
Buckley, Thomas..... 318
Buck, Samuel..... 155
Buell and Union Pac. R.R. Co., McKean *vs*..... 343
Buell, D. E.....119, 343
Buell, Johnson *vs*..... 508
Bugby, Natoma Water Co. *vs*..... 463
Buick, Sherman *vs*..... 109, 214, 462, 463
Bullion Lode.....93, 120
Bullion Mg. Co..... 446
Bullion Mg. Co., Courchanie *vs*..... 525
Bullion M Co. *vs.* Crœsus G. & S. M. Co.....499, 508, 521, 522
Bullion Mg. Co., 420 Mg. Co. *vs*.... 444, 500, 521, 593, 595, 597, 600

PAGE.
Bumpus, Stone *vs*..... 593
Bunker Hill Quartz Mining Co..... 101
Burage *vs*. Smith..... .....524, 590, 604
Burgess, M. F..... 273
Burgett *vs*. Burgett..... 174
Burge *vs*. Underwood..... 478
Burlington Lode..... . 513
Burnet, Ewing *vs*..... 491
Burnette, H..... 167
Burnette, Ricketts *vs*..... 448
Burnham, Geo..... 207
Burt, Duryea *vs*.....443, 513, 514, 595
Burton, Harkness *vs*..... ..... 490
Bustford, H. B..... 278
Bute, G. A..... 215
Butler, Davis *vs*.....489, 595
Butte Canal and Ditch Co. *vs*. Vaughn..... ..... 478
Butte M. Co., Blake *vs*.....512, 515
Butterfield, Thomas..... 169
Butterwood, Thomas..... 168
Bying, Carleton *vs*..... 126
Byington, McGarrity *vs*...392, 489, 499, 501, 519, 595
Cable Cons. Mg. Co., Golden Fleece Mg. Co. *vs*.....490, 492, 498, 501, 508, 517, 518, 519, 524, 591, 593, 594, 598
Cadwalader, Geo..... 206
Cain, Coryell *vs*..... ..... 593
Caldwell, *vs*. Bower..... 440
Caldwell, Miles *vs*..... 415
California *vs*. Dardanelles....97, 134, 209
California *vs*. Poley and Thomas.... 212
California Silver Mining Company, 97 209
California, State of, Keystone Con. Mg. Co. *vs*..... ..... .....101, 840
California, State of, Townsite of Amador City *vs*..... 101
Calkins, L. G..... ..... 189
Callison, Mt. Diablo Mg. Co. *vs*.... 498, 499, 503, 507, 508, 511, 526, 591, 593, 595, 597
Cameron, D. E..... 117
Camman, Hartwell *vs*..... ..... 510
Campbell *vs*. Adams..... 599
Campbell, Cary *vs*..... 595
Campbell *vs*. Rankin.....413, 594
Campbell, Rankin *vs*..... ..... 415
Camp Bird Lode.....245, 411
Cannon, Catherine B..... 189
Cannon, Chas. W..... 189
Cannon, Henry..... ... 189
Cann *vs*. Warner..... ... ... 126
Capron *vs*. Strout.....440, 500
Carboniferous Mine..... ..... 543
Carhart *vs*. Montana Mg. Co..... .... 524
Carleton, *vs*. Bying..... 126
Carleton, Geo..... 117
Carpenter, G. J..... 206
Carpenter, Ophir Mg. Co. *vs*..... 478
Carpenter, William O..... 179
PAGE.
Carr *vs*. Central Pacific R.R. Co..... 523
Carrigan, Henry..... .. 182
Carr, James A..... ..... 208
Carroll *vs*. Safford..... ..... 241, 328
Carroll, Thomas..... 395
Carron *vs*. Connell..... .... ..... 520
Carron *vs*. Curtis..... 265
Carter, Maney *vs*..... 182
Caruthers *vs*. Pemberton..... 478
Caruthers *vs*. Wheeler..... 126
Cary *vs*. Campbell..... 595
Cascade Lode.....75, 185
Cascade S. Mg. Co..... 75
Case, Collins *vs*..... 491
Casey, Henry.....101, 459
Casket Lode..... ..... 517
Cassiday, Stryker *vs*..... 440
Cassin, John..... 208
Castillero, U. S. *vs*..... 498
Castle, Taylor *vs*.....443, 595
Catlin, A. P ..... 207
Central City, Townsite of...183, 263, 345
Central Lode..... 318
Central Pac. R.R. Co.....90, 280, 336
Central Pacific R.R. Co., Carr *vs*.... 523
Central Pacific R.R. Co., Doran *vs*. 510
Central Pacific R.R. Co. *vs*. Mammoth Blue Gravel Co..... 144
Central Smelting Co..... 441
Central Smelting Co., Kahn *vs*..... 440
Chadwick, Brown *vs*..... 509
Chadwick, Stewart *vs*.....511, 524
Chaffee, J. B.....87, 90
Chambers, R. C.....91, 199
Chambers, Stoddard *vs*..... .... ... 265
Champion Lode..... 360
Chapman, Levi..... 192
Chapman *vs*. Toy Long....492, 498, 515, 591, 593 597, 599
Charles *vs*. Eschleman..... 514
Charlotte Lode..... 419
Charles Mine..... 205
Chase, Dudley..... 181
Chase *vs*. Savage S. M. Co.....493, 523, 594, 595
Chavanne, André..... ..... 283
Chavanne Quartz Mine..... 283
Chavner, Thomas..... 454
Checkley, Midland Railway Co. *vs*. 509, 510
Cheeseman, Iron-Silver Mg. Co. *vs*. 400
Cherry, T. F..... 315
Chester Emery Co. *vs*. Lucas..... 495
Chew, Esmond *vs*.....522, 593
Chicago and Clear Creek G. & S. Mg. Co. ..... 85
Chicago Mine.... ..... 220
Childers, Harry..... 283
Child, John L..... 150
Child, Warren G..... 150
Choate, Ah Yew *vs*...509, 514, 590, 591, 602

PAGE.
Chollar Potosi Mg. Co. .... 93
Choteau, Gibson *vs.* .... 452
Chrysolite Mine .... 543
Chrysolite S. Mg. C. .... 541, 544, 547
Chumasero *vs.* Vial .... 512
Citizens of Central City .... 184
City Rock, King of the West *vs.* .... 206
City Rock Lode .... 199
City Rock Mg. Co., of London, England .... 199
Clancy, Patrick .... 379
Clark, Davis *vs.* .... 600
Clark *vs.* Duval .... 491, 591, 593
Clarke, Edward .... 259
Clark, Fred. A. .... 80
Clark, H. C. .... 255
Clark, Henshaw *vs.* .... 525, 591, 593
Clark, James .... 255
Clark, Jones *vs.* .... 514, 595
Clark *vs.* McElroy .... 595
Clarkson, W. H. .... 543
Clark, Spiegelberg *vs.* .... 421
Clark *vs.* Willett .... 593
Clark, Wm. .... 150
Clayton, Wm. .... 161
Clear Creek S. Mg. Co. .... 85
Clements, Coleman *vs.* .... 501, 595
Clements, L. B. .... 169
Cleveland *vs.* Meyrick .... 509
Cleveland, Wilson *vs.* .... 595
Clipper Mg. Claim .... 318
Clute, F. W. .... 237
Coalville, Townsite of .... 343
Coates, Beckner *vs.* .... 188
Cobb, Murphy *vs.* .... 526
Cochran, Samuel .... 208
Cochran, West *vs.* .... 105
Coffman, Lucinda .... 264
Colbath, Lemuel U. .... 154
Cole *vs.* Cole .... 132
Coleman *vs.* Clements .... 501, 595
Coleman *vs.* Grubb .... 493
Collins *vs.* Case .... 491
Collins, Fabian *vs.* .... 478
Collins, George H. .... 287
Collins, P. .... 254
Colorado Central G. M. Co. .... 255
Colorado Central Lode .... 180
Colorado Chief Mine .... 543
Colorado Min. Land Mg. & Sg. Co. .. 235
Colorado, State of, Townsite of Silver Cliff *vs.* .... 261
Colorado Terrible Lode Mg. Co. .... 80
Colorado Territory Nat'l S. M. Co. .. 315
Colvin *vs.* McCune .... 491
Comstock Lode .... 10, 12, 22, 25, 26, 93, 98, 197, 226, 302, 445, 603
Coney Lode .... 279
Coney *vs.* Mammoth .... 279
Conger *vs.* Weaver .... 456, 590, 591
Conkling, Roscoe, Lode .... 315
Connell, Carron *vs.* (See O'Connell.) 520

PAGE.
Connors *vs.* McPhee .... 594
Consolidated Virginia Mg. Co. .... 468
Cons. Va. M. Co., Kinney *vs.* .... 495, 506, 516, 593, 594, 595
Constable *vs.* Nicholson .... 497
Constans, Shafer *vs.* .... 490
Constitution *vs.* Phœnix .... 273
Converse, H. D. .... 146
Cooke, H. D. .... 246
Cook, John .... 171
Cook, John M. .... 171
Cooney, Rogers *vs.* .... 493, 522, 591, 594
Cooper, D. .... 129
Cooper, Ferris *vs.* .... 490, 595
Cooper, M. D. .... 301
Cooper *vs.* Roberts .... 104, 109, 495, 521, 590, 591
Coover, Ferris *vs.* .... 490, 595
Copper Hill Mg. Co. *vs.* Spencer .... 595
Copp, H. N. .... 275
Corbett *vs.* Berryhill .... 511
Cornell *vs.* Moulton .... 126
Corning, G. C. .... 208
Corning Tunnel M. & R. Co. *vs.* Pell, 208, 322, 526, 593
Correa *vs.* Frietas .... 456, 516, 518, 519, 525, 592, 593
Coryell *vs.* Cain .... 593
Cosser & Co. .... 445
Cosser, John .... 445
Cosser, Walter .... 445
Cotts, List *vs.* .... 495
County of Sac, Cromwell *vs.* .... 415
Courchanie *vs.* Bullion Mg. Co. .... 525
Courtzen, Fritz .... 120
Cowan, Shepley *vs.* .... 359
Coward, Felger *vs.* .... 494, 595
Craig *vs.* Barcroft .... 521
Craig *vs.* Bradford .... 592
Craig *vs.* Leslie .... 193
Craig *vs.* Radford .... 193
Crandall *vs.* Woods .... 591
Crawford, M. J. .... 257
Creary, Dougherty *vs.* .... 489
Crismon, Chas. .... 340
Crismon, George .... 340
Crismon, Union Pac. R R. Co. *vs.* .. 340
Crockwell, J. D. M. .... 176
Crœsus G. & S. M. Co., Bullion M. Co. *vs.* .... 499, 508, 521, 522
Crommeling, Minter *vs.* .... 265, 430
Cromwell *vs.* County of Sac. .... 415
Cross *vs.* De Valle .... 193, 592
Crossman *vs.* Pendery .... 399
Crouch, H. W. R. .... 186
Crowe, D. H. .... 190
Crow, Henry .... 80
Crow Indian Reservation .... 236
Crow, Waring *vs.* .... 489, 497, 516, 523, 524, 595
Crusade Mine .... 115
Cullen, Oro Fino *vs.* .... 498

PAGE.
Cullerton *vs.* Mead..... 271
Cullins, Flagstaff Silver Mg. Co. of Utah *vs*..... 438
Culver, Scogin *vs*..... 264
Cumberland Coal Co *vs.* Sherman... 491
Cumberland, Rex *vs*..... 126
Cunningham, Francis.....266, 273
Cunningham, O'Keiffe *vs.* 506, 522, 593
Curran, Henry..... 156
Curtis, Carron *vs*..... 265
Curtis *vs.* Daniel..... 510
Curtis *vs.* Sutter..... 456
Cuzinno, Calvin ..... ..... ..... 120
Daley Lode..... ..... 383
Dalton, *vs.* Bowker..... 478
Daly, Marcus.....158, 208
Daly, William W..... 116
Dana, J. D.....563, 564
Daney, G. & S. Mg. Co., Heydenfeldt *vs*.....359, 464, 590, 591, 592, 602, 604
Dangberg, Union M. Co. *vs*..... 514
Daniel, Curtis *vs*..... 510
Daniel Peters Lode..... .... 88
Daniels, Lansdale *vs*..... 406
Daniel Webster Lode..... 143
Darby, Edwards *vs*..... ..... 521
Dardanelles, Overman *vs*..... 98
Dardanelles Mg. Co. *vs.* Cala. Mg. Co.....97, 134, 209
Dark *vs.* Johnston..... 510
Darnell, Gordon *vs*..... 492
Dart, Josiah..... 100
Darvill *vs* Roper..... 509
David, L. S .... ..... ... 121
Davies, D. T..... 291
Davies Lode..... . 291
Davis *vs.* Alvord..... 439
Davis & Co., Rich *vs*..... 520
Davis *vs.* Brown ..... 415
Davis *vs.* Butler.....489, 595
Davis *vs.* Clark..... 600
Davis *vs.* Flagstaff S. M. Co..... 491
Davis *vs.* Gale..... 478
Davis, John..... 120
Davis, Jno. A..... 296
Davis, John M..... 169
Davis, Seaton Mg. Co. *vs.* ..... 296
Davis, Thomas.....116, 148
Deadwood, Townsite of..... 324
Dean, Fuhr *vs*..... 497
Dean, N. C..... 454
December Mg. Claim..... 318
Decker *vs.* Howell..... ..... 595
De Kay, Drake..... 548
Delmonico *vs.* Rondebush..... 491
Del Norte Lode..... ..... 241
Delogey *vs.* Rentoul..... 132
Denver, A. St. C..... 205
Dephanger, Philip..... 330
Depuy *vs.* Williams.....489, 593, 595
DeValle, Cross *vs*..... .....193, 592

PAGE.
Devlin, Hastings *vs*..... 595
Devlin, Hughes *vs*....456, 509, 511, 515, 593, 595
Dexter Lime Rock Co. *vs.* Dexter.... 497
Dexter, Tabor *vs*..... 453
Deys, G. W..... 192
Dickason, J. Q..... 119
Dickerson, J. E..... 117
Dickert, F..... ..... 216
Dickinson *vs.* Valpy..... 443, 514
Dils, Logan *vs*.... ..... 491
Dingman, William..... 87
Dix, John A..... ..... 183
Dixon, Merrill *vs*..... 510
Dixon, Ortman *vs*..... 478
Doak *vs.* Brubaker.....488, 501
Dobbie, John..... ..... 168
Dodge, G. S..... 259
Dodsworth, M..... 192
Doe, Smith *vs*.....491, 524, 525, 591, 593
Dollarhide, Long *vs*..... 452
Dolly Varden Mine..... 245
Dolph, Barney *vs*.....241, 265
Don Francisco Arias..... ... 251
Don Julian Ursula..... .... 251
Doran *vs.* Central Pacific R.R. Co... 510, 590, 591, 593, 604
Dorsey, Edward B..... ..... ..... 543
Doubloon Lode..... 242
Dougherty *vs.* Creary..... 489
Douglas, Draper *vs*.....507, 595
Downing *vs.* Rankin..... 595
Drake, Witherspoon *vs*.....265, 266
Draper *vs.* Douglas.....507, 595
Drew, Chas. S..... ..... 454
Driscoll, Logan *vs*..... 522, 591, 593
Dryton Quartz Mine..... ..... 296
Duffield, M. B..... ..... 119
Duncan, Weatherspoon *vs*...241, 328, 330
Dunkirk Lode..... 122
Dunnell, M. H..... 339
Dunn, James..... 223
Dunsford, Rex *vs*..... ..... .. 509
Du Rell, B. M..... 154
Durgan, J..... 445
Duryea *vs.* Burt .....443, 513, 514, 595
Dussain, J. J..... ..... 167
Dutch Flat W. Co. *vs.* Mooney..... 499, 595
Duval, Clark *vs*.....491, 591, 593
Eagle Copper Co., Boston H. M. Co. *vs*..... ..... 320
Eagle Lode..... 330
Eagle Salt Works..... 336
Earl, F. W..... 205
Earl Mine..... 205
Early, Grady *vs*..... 498
East Noonday North Claim..... 375
East Savage Lode..... ..... 383
Eaton, Geo. W..... 117
Eaton Mine..... ..... 543
Eccleson, Richard..... ..... 257

PAGE.
Eclipse G. & S. Mg. Co. *vs.* Spring... 505
Eddy, H. H..... 279
Edwards *vs.* Darby..... 521
Edwards, Gout *vs*..... 126
Edwards, King *vs*.....498, 499, 501, 502, 520, 594, 595
Ege *vs.* Medlar..... 491
El Dorado W. & M. Co., Osgood *vs.* 478
Elkhorn Lode..... 517
Elk Lode..... 283
Elliot *vs.* Peirsol..... 244
Elliott, W. W..... 192
Elridge, Alma ..... 339
Elzy, E. J..... 117
Elroy, Clark *vs*..... 595
Embody, O..... 146
Embry, Andrew M..... 241
Empire State, Texas, & Lincoln G. M. Co..... 84
English *vs.* Johnson...415, 493, 498, 501, 502, 515, 516, 517, 518, 519, 593, 595
Ennis, Murley *vs*.....489, 491, 493, 507, 520, 521, 594, 595
Ensminger *vs.* McIntyre.....591, 593
Equator Lode..... 178
Equator Mg. & Smelting Co..... 144, 178
Equator Mg. & Smelting Co., Harris *vs*..... 419
Erhardt *vs.* Boaro..... 394
Eschleman, Charles *vs*..... 514
Esmond *vs.* Chew.....522, 593
Estelle, James M. ..... 420
Eureka Cons. Mg. Co. *vs.* Richmond Mg. Co.....168, 239, 321, 352, 514, 591, 593 598
Eureka Cons. Mg. Co., Richmond Mg. Co. *vs*..... 365
Eureka Lode.....125, 143, 283
Eureka Mg. Co., Jenny Lind Mg. Co. *vs*.....124, 144, 148, 190, 218
Eureka Quartz Mining Company... 101
Europa M. Co., Southern Cross G. & S. M. Co. *vs*..... 503
Evans *vs.* Haefner ..... 510
Evans *vs.* Rendall..... 187
Evans, Zollars *vs*..... 511
Ewing *vs.* Burnet..... 491
Ewing *vs.* Hartman..... 161
Excelsior Lode..... 129
Excelsior Sulphur Mine..... 182
Fabian *vs.* Collins..... 478
Fairbanks *vs.* Woodhouse..499, 594, 595
Fairfax Devisee *vs.* Hunter..... 193
Fair, James G. ..... 198
Fairview Mine.....186, 543
Farquharson, Meyers *vs*..494, 497, 521, 595
Farr, G. W..... 280
Farwell *vs.* Rogers..... 126
Faxon *vs.* Barnard..... 503
Feather River Water Co., Jackson *vs*.....520, 595
Federy, Beard *vs*..... 427
Felger *vs.* Coward.....494, 595
Fenton, G. A..... 315
Fenton Lode ..... 315
Ferguson, Lombards *vs*..... 595
Ferguson, Sylvester..... 257
Ferris *vs.* Cooper. (See Coover)..... 595
Ferris *vs.* Coover..... 490
Ferris, Union M. Co. *vs*..... 514
Fett, Goller *vs*..... 595
Fillins, John ..... 92
Fingel Lode..... 123
Finley, William M..... 256
First Chance Lode..... 289
First Extension N. of the Chicago Mine..... 220
First National Bank *vs.* Bissell. ..... 491
Fishback *vs.* Miller..... 511
Fisher, Jacob B..... 205
Fisk, Andrew J..... 189
Fitch, Thomas..... 118
Fitzgerald, Leadville Mg. Co. *vs*.... 452
Fitzgerald *vs.* Urton.....478, 593
Flagstaff Mine.....83, 438
Flagstaff S. M. Co., Davis *vs*.. 491, 494
Flagstaff S. M. Co. *vs.* Patrick .491, 494
Flagstaff S. M. Co., of Utah, *vs.* Cullins..... 438
Flagstaff S. M. Co., of Utah, *vs.* Tarbet..... .....277, 347, 591, 593
Fletcher, Phœnix Water Co. *vs*..... 478
Flower, Fremont *vs*.....495, 514
Foley, John H..... 191
Foley, J. M..... 191
Folsom, People *vs*..... 590
Foote, Geo. B.....299, 304
Foote *vs.* National M. Co...498, 507, 591
Forbes *vs.* Gracey.....311, 405, 468, 591, 592
Ford, E. C.....259, 287
Ford, Hobart *vs*..... 478
Forsyth, Bryan *vs*..... 330
Forsyth, Meehan *vs*..... 330
Fort Maginnis..... 310
Fortuna Lode..... 384
Foster, Jesse..... 159
Foster, W. S..... 337
Four Per Cent Lode..... 289
420 M. Co. *vs.* Bullion Co.....444, 500, 521, 593, 595, 597, 600
'49 and '56 Q. Mg. Co., Brown *vs*.... 508 593
Fousher *vs.* Grigsby..... 440
Fowler, Allen..... 91
Fowler, Atherton *vs*..... 407
Franklin Lode..... 82
Fraser, Jno. R..... 324
Freed, Thorp *vs*..... 478
Fremont *vs.* Flower.....495, 514
Fremont Co. *vs.* Railroad..... 108
Fremont, Merced Mg. Co. *vs*..... 456, 524, 593

PAGE.
Fremont *vs.* Seals.....590, 591, 593
French *vs.* Brewer..... 495
French *vs.* Spencer..... 241
Fricot, Attwood *vs.*.....415, 516, 517, 518, 593, 595
Frietas, Correa *vs.*.....456, 516, 518, 519, 525, 592, 593
Frisbie, Hutton *vs.*..... 451
Frisbie, Whitney *vs.*..... 241
Frisbie *vs.* Whitney..... 451
Frohner, Meyendorf *vs.*..... 515
Frue, W. B..... 268
Fuga, Moses M..... 186
Fuhr *vs.* Dean..... 497
Fuller, A. L..... ..... 171
Fuller *vs.* Hampton..... 182
Fuller, H. B..... 171
Fulton, Judd *vs.*..... ... 126
Gagen Quartz Mine..... 87
Gaines *vs.* Nicholson ..... ..... 104
Gale, Davis *vs.*..... 478
Galena S. Mg. Co..... ..... 154
Gallagher, Basey *vs.*.....478, 602
Gallagher, Chas..... 245
Gallagher, J. B..... 192
Gallagher, Keystone Mg. Co. *vs.*..... 500
Gallagher, Patrick..... 245
Gardiner, H. C..... 543
Garringer, Woolman *vs.*..... 478
Garrison, Ahly *vs.*..... 492
Gas Co., Gesner *vs.*..... 510
Gascon, State *vs.*..... 126
Gashwiler, Jno. W..... 296
Gashwiler *vs.* Willis..... 494
Gaston, Wilkinson *vs* ..... 126
Gatewood *vs.* McLaughlin.....518, 593, 595
Gay, M. G..... 120
Gear, United States *vs.*..... .....510, 590
Gelcich *vs.* Moriarty.....507, 518, 595
Geneva Mine..... ... ..... 459
George, E. T..... 178
Gerrens *vs.* Huhn & Hunt S. M. Co... 494
Gesleman, Spicer *vs.*..... 174
Gesner *vs.* Gas Co..... 510
Geyser Q. M. Co., Stone *vs* .....488, 489, 595
Gibbings, Listowell *vs.*..... 509
Gibbins, G. W ..... 294
Gibson *vs.* Choteau..... 452
Gibson *vs.* Puchta.....491, 591, 593
Gildersleeve, Hibschle *vs.*.....591, 593, 594, 595
Gillan *vs.* Hutchinson.... 491, 593, 595
Gillespie, W. M..... 128
Gillette, Daniel W..... 458
Gill, Hext *vs.*..... ..... 510
Gilmore *vs.* Ontario Iron Co..... 500
Gilson William..... ..... 223
Gilt Edge Lode..... 540
Gippert, Chas..... ..... 116
Giraffe Lode..... 151
PAGE.
Gisborn, Houtz *vs.*.....490, 511, 520
Gisborn, M. T..... ..... 146
Glauckauf *vs.* Reed..... 595
Gleeson *vs.* Martin White M. Co.... 489, 492, 494, 501, 506, 512, 522
Golconda Mine and Mill-site..... 90
Goldberg *vs.* Taylor..... 490
Golden Fleece Co. *vs.* Cable Cons. Co.....490, 491, 492, 498, 501, 508, 517, 518, 519, 524, 591, 593, 594, 598
Gold Hill Ledge..... 495
Gold Hill Quartz Mining Co. *vs.* Ish 454, 590, 591, 593
Goldstone, Samuel..... 245
Goller *vs.* Fett... ..... . 595
Gomez, United States *vs.*..... 250
Gonu *vs.* Russell..... 505
Gordon *vs.* Darnell..... 492
Gordon *vs.* Swan. ..... 494
Gore *vs.* McBrayer.....496, 508, 512, 513, 523, 593, 595
Gorham, C. T..... ..... 204
Gorham *vs.* Wing..... 126
Gorlinski, J..... 160
Gormley, Lyon *vs.*..... ..... 510
Gottschall *vs.* Melsing.....515, 525
Gould, C. A..... 150
Gout *vs.* Edwards..... 126
Governeur's Heirs *vs.* Robertson.... 193, 592
Gracey, Forbes *vs.*.....311, 405, 468, 591, 592
Grady *vs.* Early..... 498
Granger, Farley B ..... 148
Granger, Lafayette..... 148
Grant, Morgan..... ..... 150
Grant, U. S., Jr. ..... 543
Gratiot, U. S. *vs.*..... ..... 590
Gray, Roach *vs.*.....502, 595
Grayson *vs.* Knight.... ..... 105
Green, Rutherford *vs.*.....106, 107
Green Mountain Lode..... 508
Gregory *vs.* Harris..... ..... 593
Gries, Bank of Penn. *vs.*..... ..... 440
Griffith *vs.* Bogert..... ..... 126
Grigsby, Fousher *vs.*..... 440
Grisar *vs.* McDowell ..... 311
Groesbeck, Nicholas..... 340
Grubb, Coleman *vs.*..... 493
Guffey, Veeder *vs.*..... 108
Gunboat Lode..... 80
Gunboat, Terrible *vs.*..... 80
Gunnell Extension..... 184
Gyges' Estate..... 465
Haefner, Evans *vs.*..... 510
Haggin, J. B..... 283
Hagood, Mitchell *vs.* (see Hargood) 492, 591
Haines, H. S..... 116
Hale, A. H..... ..... 290
Hale & Norcross G. & S. M. Co. *vs.* Storey Co.....512, 593

PAGE.
Hall *vs.* Litchfield..... 338
Halsey *vs.* Hewitt..... 235
Hamill, Wm. A.....80, 92, 140
Ham, John C..... 100
Hampton, Fuller *vs.*..... 132
Hancock *vs.* Watson..... 497
Hardenbergh *vs.* Bacon....491, 495, 593, 595
Hardenbergh, J. R..... 292
Harding & Wilson..... 414
Hargood, Mitchell *vs.* (see Hagood). 598
Harkness *vs.* Burton..... 490
Harkness, Osmyn ..... 175
Harmon, A. K. P..... 97
Harriman, Schulenburg *vs.*..... 466
Harris, Clayton..... 273
Harris *vs.* Equator Mg. and Smelting Co..... 419
Harris, Gregory *vs.*..... 593
Harris *vs.* Tyson..... 509
Hartman, Ewing *vs* ..... 161
Hartwell *vs.* Camman..... 510
Harvey *vs.* Bryan..... 592
Harvey *vs.* Ryan.....501, 593, 595
Harvey, Susan J..... 257
Harvey, William..... 257
Haseltine, J. W..... 177
Hastings *vs.* Devlin..... 595
Hattie Lode..... 315
Hawk Lode..... 395
Hayden & Gilchrist ..... 140
Haynes, G. A..... 295
Headen, Pope *vs.*..... 126
Headlight Lode..... 259
Headlight Mg. Co..... 260
Heaton, Packer *vs.*.....526, 594
Heaton, W. D..... 146
Heintzen, Charles..... 237
Heintzen, Ross *vs.*..... 525
Helvetia Lode..... 276
Hempstead & Kirkpatrick..... 123
Hendel, Charles W..... 237
Henderson, Edward W..... 241
Hendree, Atkins *vs.*....498, 506, 593, 595
Henke, Lenfers *vs.*..... 509
Henry, John ..... 193
Hense, Sullivan *vs.*... 494, 501, 503, 506, 507, 594 595
Henshaw *vs.* Bissell..... 171
Henshaw *vs.* Clark.....525, 591, 593
Herbert *vs.* King..... 491
Hercules Lode..... 137
Hess *vs.* Winder.415, 421, 493, 499, 511, 517, 593, 595
Hewitt, Halsey *vs.*..... 235
Hext *vs.* Gill..... 510
Heydenfeldt *vs.* Daney G. & S. Mg. Co....359, 464, 590, 591, 592, 602, 604
Hibour *vs.* Reeding..... 514
Hibschle *vs.* Gildersleeve...591, 593, 594, 595
Hicks *vs.* Bell.....517, 590, 591, 594

PAGE.
Hidden Treasure Mine..... 159
Higginbotham, Thomas A..... 142
Higgins *vs.* Houghton.....105, 590, 591, 593, 604
Highland Chief, Antelope *vs.*..... 162
Highland Chief, Prince of Wales *vs.* 162
Highland Chief, Wandering Boy *vs.*. 162
Hill *vs.* King..... 456
Hill, N. P..... 295
Hill *vs.* Smith..... 478
Hirschman, Moses..... 113
Hitchcock, Patterson *vs.*....503, 508, 519, 593, 594
Hobart *vs.* Ford..... 478
Hobart *vs.* Wicks..... 478
Hobbs, Wm..... 318
Hodgson, Orr *vs.*..... 193
Hoffman, Chas. T ..... 303
Hogden *vs.* State of California..... 342
Holland *vs.* M. A. G. Q. M. Co...507, 595
Holmes, David..... 190
Homer, Wm. H..... 171
Homestead Lode..... 143
Honey-comb Lode..... 170
Hoofnagle *vs.* Anderson..... 429
Hooper, W. J..... 130
Hooper, Wm. H..... 309
Hooper, W. J..... 127
Hoosac Consolidated G. & S. Mg. Co. 245
Hopkins, G. W..... 448
Horn *vs.* Jones..... 456
Horrid Lode ..... 92
Houghton, Higgins *vs.*.....105, 590, 591, 593, 604
Houseworth, V. A..... 445
Houtz *vs.* Gisborn.....490, 511, 520
Houtz, J. S..... 150
Howell, Decker *vs.*..... 595
Howe *vs.* State of Missouri..... 108
Hoyt & Brothers..... 117
Hoyt, H. M..... 301
Hoyt, Sears & McKee..... 115
Huff, Van Valkenberg *vs.*....491, 508, 594
Hughes *vs.* Devlin.....456, 509, 511. 515, 593, 595
Hugunin *vs.* McCunniff....496, 517, 524
Huhn & Hunt S. M. Co., Gerrens *vs.* 494
Hullinger, A. D..... 169
Hullinger, H. C..... 169
Hullinger, W. S..... 169
Hull, Weeks *vs* ..... 126
Humphreys, George O..... 402
Hunter, David..... 231
Hunter, Fairfax's Devisee *vs.*..... 193
Hunter, John..... 222
Hunter *vs.* Savage Con. S. M. Co.... 500
Huntington, Von Schmidt *vs.*..... 499
Hunt, J. Sterry..... 563
Hunt, Lyon *vs.*..... 126
Hunt, Wm. H..... 540
Hurricane Lode..... 283
Hussey, Warren..... 154

PAGE.
Husted, C. 215
Hutchings, J. E. 343
Hutchings *vs.* Lowe 328
Hutchinson, Gillan *vs.* 491, 593, 595
Hutton *vs.* Frisbie 451
Huyett, A. H. 114
Huyett, Alex. 85
Hyde, Wood *vs.* 137
Ida City Lode 301
Ihrie, George P. 99
Indiana *vs.* Miller 521, 590
Inge, Liggings *vs.* 478
Ingleside, Townsite of 324
Inimitable Company 75
Innes, Brockway *vs.* 440
International Mg. & Exchange Co. 137
Iowa Mg. Co. *vs.* Bonanza Mg. Co. 243, 259
Irish Mine 205
Iron Mine 454
Iron-Silver Mg. Co. *vs.* Cheeseman. 400
Irvine *vs.* Irvine 241
Irwin, J. G. 90
Irwin *vs.* Phillips 478
Ish, Gold Hill Quartz Mg. Co. *vs.* 454, 590, 591, 593
Ivanhoe Mg. Co. *vs.* Keystone Con. Mg. Co. 458
Ivins, A. 171
Jackson *vs.* Beach 193, 592
Jackson *vs.* Feather River Water Co. 520, 595
Jackson, Jones *vs.* 489, 522
Jackson *vs.* McMurray 515, 516
Jackson Mine 358
Jackson *vs.* Olitz 491
Jackson *vs.* Warren 271
James G. Blaine Lode 315
Jay Lode 279, 315
Jefferson Mg. Co. *vs.* Pennsylvania Mg. Co 136
Jefferson G. &. S. Mg. Co., Pralus *vs.* 456, 517, 593, 595
Jenkins *vs.* Redding 493
Jennison Ex. Titcomb *vs.* Kirk (See Titcomb) 471, 593, 602
Jenny Lind Co. *vs.* Bower & Co. 497
Jenny Lind Mg. Co. *vs.* Eureka Mg. Co. 124, 144, 148, 190, 218
J. H. Russell Lode 221
John Dare S. M. Co., Leet *vs.* 498, 507, 593
Johnny Bull Lode 395
Johnson *vs.* Buell 508
Johnson, English *vs.* 415, 493, 498, 501 502, 515, 516, 517, 518, 519, 593, 595
Johnson, Nims *vs.* 590
Johnson *vs.* Parker 513
Johnson, Swen 200
Johnson *vs.* Towsley 212, 224, 429, 430
Johnston, Atlas M. Co. *vs.* 491
Johnston, Dark *vs.* 510

PAGE.
Johnstone, Ellen W. 416
Johnstone, Mary A. 416
Johnstone *vs.* Robinson 416
Johnstone, Sarah E. 416
Jones, Charles 416
Jones *vs.* Clark 514, 595
Jones, Horn *vs.* 456
Jones *vs.* Jackson 489, 522
Jones, John P. 212, 543
Jones Lode 242
Jones *vs.* Shawhan 440
Juab Gypsum Placer 309
Judd *vs.* Fulton 126
Judd, Merritt *vs.* 512, 524 593
Judson *vs.* Mulloy 595
Julia G. & S. M. Co. 93
Julia Lode 93
Juniper Mine B. 209
Jupiter Mg. Co. *vs.* Bodie Cons. Mg. Co. 323, 381
Kahn *vs.* Central Smelting Co. 440, 514
Kahn *vs.* Old Telegraph M. Co. 515
Kansas Lode 84
Kay, Reynolds *vs.* 514
Keller, James 117
Kelly, McLaughlin *vs.* 524
Kelly *vs.* Taylor 168, 506, 595
Kemp, St. Louis Smt'g & Ref'g Co. *vs.* 424
Kemp, Thomas 232
Kemp *vs.* Starr 234
Kempton Case 171
Kempton Mine 152, 154, 188
Kenney *vs.* Con. Va. M. Co. (See Kinney) 495
Kentucky Co., Smallhouse *vs.* 440
Kenyan, Frank 118, 170
Kermode, W. A. 259
Keystone Consolidated Mining Company 101
Keystone Consolidated Mg. Co., Ivanhoe Mg. Co. *vs.* 458
Keystone Consolidated Mg. Co. *vs.* State of California 101, 340
Keystone Mine 459
Keystone Mg. Co. *vs.* Gallagher 500
Keystone M. Co., Patterson *vs.* 491, 494, 516, 517, 519, 520, 595
Kidd, St. John *vs.*, 488, 499, 520, 593, 595
Kier *vs.* Peterson 510
Kim *vs.* Osgood 126
King David Lode 129
Kingdom, Bliss *vs.* 520, 526
King *vs.* Edwards 498, 499, 501, 502, 520, 594, 595
King, Herbert *vs.* 491
King, Hill *vs.* 456
King of the West, City Rock *vs.* 199
King of the West *vs.* City Rock 206
King of the West Lode 199
King of the West Mine 204
King *vs.* Randlett 496, 524, 595

PAGE.
Kingsbury, C. W. 218
Kinney *vs.* Con. Va. M. Co. 506, 516, 593, 594, 595
Kirk, Calvin 146
Kirk, Jennison Ex. Titcomb *vs.* 471, 590, 591, 592, 593, 595, 597, 602
Kirkland, Wm. 120
Kirkpatrick, Hempstead & 123
Kissell *vs.* St. Louis Public Schools. 105
Kit Carson Mine 543
Klippel, Henry 454
Knight, A. B. 236
Knight, Grayson *vs.* 105
Knight *vs.* Morris 440
La Cata Lode 93
Ladd, G. F. 75
Ladd, Silver *vs.* 359
Lady Allen Lode 192
Lady Locke Mg. Claim 318
Laird *vs.* Waterford 591, 593
Lambard, Melton *vs.* (See Lombard) 518, 520
Landers, Samuel 345
Landes *vs.* Brant 241
Langley, Perley *vs.* 497
Lang *vs.* Phillips 126
Lansdale *vs.* Daniels 406
Lansing, C. J. 448
Last Chance No. 2 Mine 203, 206
Lathrop, S. P. 135
Laury, William 219
Lawrence, Phœnix Mg. Co. *vs.* 505, 526, 593, 595
Lawson, Leonidas M. 543
Leadville Mg. Co. *vs.* Fitzgerald 452
Leavenworth Mtn. Mg. & Tun. Co., 420
Lebanon Mg. Co., Wolfey *vs.* 490, 506, 508, 514, 515, 522, 593, 594, 597
Lee, Bradley *vs.* 503, 593, 595
Lee, Montana Territory *vs.* 492, 591, 594
Leete, B. F. 336
Leet *vs.* Jno. Dare S. M. Co. 498, 507, 593
Leighton, Joseph 117
Lenfers *vs.* Henke 509
Lentz *vs* Victor 516, 519, 590, 591
Leonard, O. B 90
Lesley, J. P. 563
Leslie, Craig *vs.* 193
Lessees of French *vs.* Spencer 241
Lessieur *vs.* Price 107
Levan, Sam'l H. 343
Levaroni *vs.* Miller 591, 593
Lewis, Barr *vs.* 126
Lewis, J. B. 135
Lewis, John F. 209
Lichtenthaler, D. W. 90
Liggings *vs.* Inge 478
Lightner, J. F. 296
Lime Lode 400
Lincoln Lode 257
Lincoln *vs.* Rogers 522, 593
Lincoln, Robert T. 310
Lincoln S. M. Co. of Col. 257
Linn, Wm. P. 180
List *vs.* Cotts 495
Listowell *vs.* Gibbings 509
Litchfield, Hall *vs.* 333
Little Chief Claim 453
Little Eva Mine 543
Live Yankee Co. *vs.* Oregon Co. 508, 594
Livingston, A. 169
Lizzie Bullock Claim 299
Lobdell *vs.* Simpson 478
Lockman, Skillman *vs.* 443
Logan *vs.* Dils 491
Logan *vs.* Driscoll 522, 591, 593
Logan, People *vs.* 593
Lombard, Melton *vs* (See Lambard.) 494, 520
Lombard *vs.* Mt. Pleasant Mg. Co. 321
Lombard, O. D. 204, 216
Lombards *vs.* Ferguson 595
Lonergan, P. J. 279
Long *vs.* Dollarhide 452
Lookout Lode 364
Los Angeles Water Co., McCormack *vs.* 440
Lowe, Middleton *vs.* 105
Low, Hutchings *vs.* 328
Lowery, Wermer *vs.* 478, 591
Lucas, Chester Emery Co. *vs.* 495
Lucerne M. Co., Weill *vs.* 488, 495, 507, 520, 594, 595
Luckhart *vs.* Ogden 493
Lucky Baldwin Lode 243
Lucus, Thomas M. 181
Ludekins, Louis 100
Lupita Claim 360
Lyell *vs.* Sanborn 514
Lyle *vs.* Richards 493
Lynch, John T. 115
Lyon *vs.* Gormley 510
Lyon *vs.* Hunt 126
Macfarlane, James 563
Mackey, A. J. 208, 209
Maclean, Jas. T. 190
Madden, Cyrus 121
Magee *vs.* Stone 492
Maginnis, Fort 310
Magnolia East Lode 148
Magnolia *vs.* Mono 146
Magnolia West Lode 148
M. A. G. Q. M. Co., Holland *vs.* 507, 595
Magruder, John R. 246
Mahoney Mg. Co. *vs.* Anglo-California Bank 494
Mahoney M. Co. *vs.* Bennett 500
Maine Boys Co. *vs.* Boston Co. 593, 600
Majors, Alexander 91
Mallett *vs.* U. S. M. Co. 488, 499, 501, 511, 513, 517, 523, 591, 594, 595
Mallory, A. H. 287

PAGE.
Malotte, Seaward *vs*..... 496
Mammoth Blue Gravel Co., Central Pacific R.R. Co. *vs*..... 144
Mammoth, Coney *vs*..... 279
Mammoth Lode.....259, 279
Mammoth Mg. Co..... 260
Mandeville, J. H..... 308
Maney *vs*. Carter..... 132
Mapes, E. J..... 79
Margaret Claim..... 360
Mark Twain Lode..... 301
Marquart C. Bradford..... 488
Marshall, Joseph M..... 84
Marshall S. Mg. Co.....144, 179
Martin & Davis *vs*. Browner..... 519
Martin White M. Co., Gleason *vs*.... 489, 492, 501, 506, 512, 513, 522, 594
Marvin *vs*. Richmond..... 132
Mary Ann Company..... 192
Masters, E. J..... 82
Mathias, Att.-Gen. *vs*..... 497
Maxon *vs*. Wilkinson (See Moxon)... 490, 591, 594
Maxwell, McGarrahan *vs*..... 252
Mayar, A. R..... 233
Maye *vs*. Tappan.....492, 525, 595
May Henrietta Lode..... 129
Maymoon Lode..... 161
McBrayer, Gore *vs*....496, 503, 512, 513, 523, 593, 595
McCarron *vs*. O'Connell.....520, 595
McClinton *vs*. Bryden..... 478
McCloud, Van Valkenberg *vs*..... 105
McCormack *vs*. Los Angeles Water Company..... 440
McCoy, R. K..... 100
McCune, Colvin *vs*..... 491
McCunniff, Hugunin *vs*.....496, 517, 524
McCunniff, Thomas..... 133
McCurdy *vs*. Alpha G. & S. M. Co... 495
McDermott, Walter..... 268
McDiortt, T. C..... 288
McDonald *vs*. Bear River Co..... 478
McDowell, Grisar *vs*..... 311
McGarrahan *vs*. Boston Mine..... 320
McGarrahan *vs*. Maxwell..... 252
McGarrahan *vs*. Mg. Co..... 250
McGarrahan, Secretary *vs*.....509, 590
McGarrahan, Wm.....206, 250
McGarrity *vs*. Byington.....392, 489, 498, 499, 501, 519, 595
McGhie, Wm..... 169
McIntire, Ensminger *vs*.....591, 593
McIntyre Lode..... 299
McKean *vs*. Buell and Union Pacific R.R. Co..... 343
McKendry, E..... 146
McKeon *vs*. Brisbee.....456, 498, 511
McKim, W. L..... 292
McKinney, Partridge *vs*.....456, 488
McLaughlin, Gatewood *vs*...518, 593, 595
McLaughlin, John..... 454
McLaughlin *vs*. Kelly..... 524
McLaughlin *vs*. Powell....509, 510, 590, 591, 595, 604
McMurdy, John H..... 133
McMurdy *vs*. Streeter.....190, 210
McMurray, Jackson *vs*.....515, 516
McNair, C. V..... 283
McNair Lode..... 283
McNassor, James..... 257
McNulty, Richardson *vs*....488, 489, 516, 518, 524, 591, 593, 595
McNulty, Wiseman *vs*.....499, 523, 595
McPhee, Connor *vs*..... 594
Mead, Cullerton *vs*..... 271
Meagher, Belk *vs*..... 402
Medlar, Ege *vs*..... 491
Meehan *vs*. Forsyth..... 330
Megerle, Terry *vs*..... 105
Melsing, Gottschall *vs*.....515, 525
Melton, John..... 205
Melton *vs*. Lombard.....494, 518, 520
Merced Mining Co., Boggs *vs*...481, 525, 590, 591, 593, 604
Merced Mg. Co. *vs*. Fremont....456, 524, 593
Merrill, Wm. S..... 223
Merrill *vs*. Dixon..... 510
Merritt *vs*. Judd.....512, 524, 593
Meyendorf *vs*. Frohner..... 515
Meyers *vs*. Farquharson....494, 497, 521, 595
Meyrick, Cleveland *vs*..... 509
Mickelthwait *vs*. Winter..... 510
Middleton *vs*. Lowe..... 105
Midland Railway Co. *vs*. Checkley... 509, 510
Midsummer Lode..... 318
Miles *vs*. Caldwell..... 415
Miller, Daniel R..... 242
Miller, Fishbach *vs*..... 511
Miller, Indiana *vs*.....521, 590
Miller, Levaroni *vs*.....591, 593
Miller Mg. & Smelting Co..... 91
Miller, Peck *vs*..... 440
Miller, R..... 171
Miller, Thomas R..... 146
Miller, W. E..... 146
Mining Co., McGarrahan *vs*..... 250
Mining Co. *vs*. Taylor..... 595
Minnesota Lode..... 256
Minter *vs*. Crommelin.....265, 430
Missouri K. T. R.R., Streeter *vs*.... 271
Missouri, State of, Howe *vs*..... 108
Mitchell *vs*. Hargood.....492, 591, 593
Molina Mine..... 253
Monarch of the North Lode..... 304
Mono, Magnolia *vs*..... 146
Monroe, Stoakes *vs*..... 493
Montana Lode..... 125
Montana Mg. Co., Carhart *vs*..... 524
Montana Territory *vs*. Lee.....492, 591, 594

PAGE.
Monte Christo Mine..... 259
Montreal Mine..... 440
Mooney, Dutch Flat W. Co. *vs*...499, 595
Mooney Flat Hydraulic Mg. Co..... 186
Moore & Co..... 171
Moore & Morgan Lode ..... 304
Moore, J. M.....164, 182
Moore, Phillips *vs*..... 592
Moore *vs.* Robbins..... 429
Moore *vs.* Smaw.....495, 514, 590, 591
Moore, State *vs*.....456, 593
Moore *vs.* Wilkeson..... 427
Morenhaut *vs.* Wilson.....488, 595
Moresi *vs.* Swift..... 521
Morey, Edward R..... 205
Morgan, J. E..... 83
Morgan, L. E..... 192
Morgan, Wm. H..... 241
Moriarty, Gelcich *vs*.....507, 518, 595
Morland, Williams *vs*..... 478
Morning Star Mine..... 253
Morrell, A..... 190
Morris, Isador ..... 441
Morris, J..... 445
Morris, Knight *vs*..... 440
Morrison, J. H..... 257
Morse, Fred. C..... 236
Morse, H. B..... 123
Morse *vs.* Streeter.....205, 216
Morton *vs.* Nebraska.....334, 336, 478, 590
Morton *vs.* Solambo C. M. Co..... 502, 512, 590, 591, 593, 595
Mosher, Thorne *vs*..... 126
Moss, George..... 544
Moulton, Cornell *vs*..... 126
Mountain Tiger Lode..... 116
Mount *vs.* Bogart..... 132
Mount Diablo M. Co. *vs.* Callison 498, 499, 503, 507, 508, 511, 526, 591, 593, 595, 597
Mount Pleasant Mine..... 204
Mt. Pleasant Mg. Co., Lombard *vs.* 321
Moxon *vs.* Wilkinson. (See Maxon) 490, 515, 518, 591, 594, 599
Mulli, Henry..... 83
Mulloy, Judson *vs*..... 595
Mulverhill, Boucher *vs*....513, 593, 594, 595
Mundy, Norris W.....116, 164
Murdock, W. B..... 243
Murley *vs.* Ennis.....489, 491, 493, 507, 520, 594, 595
Murphy *vs.* Cobb..... 526
Murphy, John R..... 118
Murphy, Stevens & Leiter *vs*..... 452
Murray, George..... 168
Mutual Benefit Life Ins. Co. *vs.* Rowand..... 440
Myers *vs.* Spooner.....488, 504, 505, 595
Nash, Nisbet *vs*..... 514
Nash, Samuel I..... 179

PAGE.
National M. Co., Foote *vs*.....498, 499, 507, 591
National Mg. and Exploring Co..... 298, 409
Natoma Water Co. *vs.* Bugby..... 463
Nebraska Claim..... 224
Nebraska, Morton *vs*.....334, 336, 478, 590
Neilson, Sanborn *vs*..... 132
Nelson *vs.* O'Neill..... 593
Nelson, U. S. *vs*..... 523
Neptune Lode..... 154
Nerce Valle..... 187
Nesmith, Remer *vs*..... 495
Nevada Consolidated Borax Co..... 50
Nevada Reservoir Ditch Co ..... 257
Nevada, State of, *vs.* Real Del Monte G. & S. M. Co..... 497
New Discovery Lode..... 453
New Era Lode..... 116
New Idria Mg. Co..... 249
New Idria Mg. Co., McGarrahan *vs.* 250
New Madrid Location..... 107
Newton, John W. ..... 540
New York M. Co., Bear River Co. *vs*..... 478
Nicholson, Constable *vs*..... 497
Nicholson, Gaines *vs*..... 104
Nicholson, John W..... 208
Nichols, W. S..... 543
Nims *vs.* Johnson..... 590
Nisbet *vs.* Nash..... 514
Noble *vs.* Sylvester..... 488
Noble, Thompson *vs*..... 510
Noonday Quartz Lode..... 376
Norris *vs.* Taylor..... 491
North Am. M. Co., Smith *vs.* 498, 502
North, C. A..... 171
North East Extension of the Yosemite Mine..... 190
Northern Extension Standard Mg. Claim ..... 318
Northern Light Mine..... 136
North, H. B..... 171
North Leadville *vs.* Searl..... 274
North, Levi..... 171
North, Levi H..... 171
North, Marari..... 171
North Noonday Mg. Co. *vs.* Orient Mg. Co..... 370
North Star Lode ..... 283
Nougues, Trafton *vs*.....500, 501
Nounan, Jos. H..... 343
Nuget Claim..... 366
Oakville Mine..... 161
Occidental M. & M. Co., Skyrme *vs.* 500
Occidental Mill & Mg. Co., Sutro Tun. Co *vs*..... 225
Occident Lode..... 281
Ocean Wave Lode..... 419
O'Connell, McCarron *vs.* (See Connell)..... 595

PAGE.
O'Conner, Henry, Jr..... 236
Offenbacher, J. V..... 324
Officer, R. W..... 288
Ogden, Luckhart *vs*..... 493
O'Hara, Smith *vs*..... 478
Ohio Mg. Claim..... 318
O'Kieffe *vs*. Cunningham.....506, 522, 593
Olathe Placer..... 287
Old Missouri Lode..... 92
Old, Robt. O..... 80
Old Telegraph Co..... 441
Old Telegraph M. Co., Kahn *vs*..... 515
Olitz, Jackson *vs*..... 491
Oliver, Benj. F..... 118
Omaha G. Mg. Co..... 191
Omaha Quartz Mine.....191, 198, 316
O'Neill, Nelson *vs*..... 593
Ontario Iron Co., Gilmore *vs*..... 500
Ontario Lode..... 503
Ophir Mg. Co. *vs*. Carpenter..... 478
Oreamuno *vs*. Uncle Sam G. & S. Mg. Co.....488, 499, 501, 595
Oregon Co., Live Yankee Co. *vs*.... 508, 594
O'Rielly, Began *vs*..... 497
Orient Co..... 379
Orient Lode..... 281
Orient Mg. C., North Noonday Mg. Co. *vs*..... 370
Original Amador Mining Company.. 101
Orion Claim..... 400
Ornstein, Jacob..... 150
Oro Fino Co. *vs*. Cullen..... 498
Oroville Mg. Co., Wright *vs*..... 497
Orr *vs*. Hodgson..... 193
Ortman *vs*. Dixon..... 478
Osgood *vs*. El Dorado W. & M. Co.. 478
Osgood, Kim *vs*..... 126
Osterman *vs*. Baldwin.....158, 193, 592
Ottenheimer, William..... 113
Overman Mining Company..... 99
Overman Mg. Co. *vs*. Dardanelles Mg. Co..... 98
Overman S. M. Co. *vs*. American M. Co.....492, 507, 593
Owens & Co..... 497
Owens, Pennsylvania Mg. Co. *vs*.... 593, 595
Owens, Thomas E..... 167
Pacific G. & S. M. Co., Pralus *vs*.... 490, 502, 518, 593, 595
Pacific Railroad Companies..... 462
Packer *vs*. Heaton.....526, 594
Page, H. F.....145, 176
Page *vs*. Weymouth..... 126
Palmer *vs*. Williams..... 491
Pandora Mine..... 543
Panoche de San Juan y los Carrisolitos..... 251
Panoche Grande, Rancho..... 250
Parker, Johnson *vs*..... 513

PAGE.
Parker, Robert..... 313
Parks, Prosser *vs*.....502, 506, 591, 595
Parrot, U. S. *vs*.....590, 591
Parry, Taylor *vs*..... 493
Partridge *vs*. McKinney.....456, 488
Patrick, Flagstaff S. M. Co. *vs*...491, 494
Patrick, J. N. H..... 438
Patten, A. E..... 313
Patterson, *vs*. Hitchcock...503, 508, 519, 593, 594
Patterson *vs*. Keystone M. Co..... 491, 494, 516, 517, 519, 520, 595
Patterson *vs*. Winn..... 429
Patton, Oliver A..... 187
Patton, R. B..... 133
Paul, Philip..... 92
Paymaster Mine..... 522
Payne, William..... 219
Peck *vs*. Miller..... 440
Peerless Lode..... 235
Peerless Quartz Mine..... 296
Peirsol, Elliot *vs*..... 244
Pell, Corning Tunnel C. *vs*.....322, 526, 593
Pell, W. G..... 208
Pemberton, Caruthers *vs*..... 478
Pendery Claim..... 400
Pendery, Crossman *vs*..... 399
Pennsylvania, Jefferson *vs*..... 136
Pennsylvania Mg. Claim..... 318
Pennsylvania Mg. Co. *vs*. Owens.... 593, 595
People *vs*. Folsom..... 590
People *vs*. Logan..... 593
Perley *vs*. Langley..... 497
Peterson, Atchison *vs*.....478, 602
Peterson, Kier *vs*..... 510
Peters, Wiggins *vs*..... 126
Philadelphia Lode..... 194
Phillips, Irwin *vs*..... 478
Phillips, John C..... 267
Phillips, Lang *vs*..... 126
Phillips *vs*. Moore..... 592
Philpotts *vs*. Blasdell...495, 512, 520, 594, 595
Phœnix, Constitution *vs*..... 273
Phœnix Lode..... 273
Phœnix Mill and Mg. Co. *vs*. Lawrence.....505, 526, 593, 595
Phœnix Water Co. *vs*. Fletcher..... 478
Pier, Wm. H..... 92
Pinedo, Arie..... 266
Pine Lode..... 411
Pitt, H. F..... 254
Pitts, J..... 199
Pitts, W. H..... 199
Pocotillo Mine..... 512
Pocotillo S. M. Co., Brandon *vs*..... 512
Poley, L. J..... 212
Polk's Lessee *s*. Wendell..... 427
Pollard *vs*. Shively..... 504
Pope *vs*. Headen..... 126

PAGE.
Popplein, Geo. J..... 315
Popplein, Nicholas..... 315
Porter, Cancey..... 159
Porterfield, Chas..... 182
Porter, Henry H..... 179
Post, H. A. V..... 543
Potter. Amasa A..... 79
Potosi G. &. S. Co., Blodgett *vs*.496, 595
Potts, Joseph..... 353
Powell, J..... 445
Powell, McLaughlin *vs*....509. 510, 590, 591, 595, 604
Powell Placer..... 79
Pralus *vs*. Jefferson G. & S. Mg. Co.....456, 517, 593, 595
Pralus *vs*. Pacific G. & S. M. Co.... 490, 502, 518, 593, 595
Price, Lessieur *vs*..... 107
Pride of the West Lode..... 194
Pride of the West Mine..... 214
Pride of the West 2d Lode..... 130
Prince of Wales *vs*. Highland Chief 162
Prince of Wales *vs*. Wellington..... 162
Prosser *vs*. Parks.....502, 506, 591, 595
Puchta, Gibson *vs*.....491,591, 593
Putnam, Settembre *vs*.....443, 513, 595
Queen Victoria Lode..... 130
Quick, Susquehanna Co. *vs*..... 490
Quirk *vs*. Tralk.....593, 595
Radford, Craig *vs*..... 193
Railroad *vs*. Fremont Co..... 103
Railroad *vs*. Smith.....103, 165
Railway Co., Doran *vs*...590, 591, 593, 604
Railway Co., Stroud *vs*.....591, 604
Ramage, Wm. W..... 177
Rancho Panoche Grande..... 250
Randall, C. M..... 317
Randall, J. S..... 317
Randlett, King *vs*.....496, 524, 595
Rankin, Campbell *vs*.....413, 594
Rankin *vs*. Campbell..... 415
Rankin, Downing *vs*..... 595
Raymond, R. W.....354, 548
Real Del Monte G & S M. Co., State of Nevada *vs*..... 497
Real de los Aguilas..... 251
Redden, R. J..... 340
Redding, Jenkins *vs*..... 493
Red Lyon Mg. Claim..... 318
Red Pine Mine..... 158
Red Warrior Lode..... 117
Reed and Sanders..... 79
Reed, Boardman *vs*..... 429
Reed, Glauckauf *vs*..... 595
Reeding, Hibour *vs*..... 514
Reiche *vs*. Smythe..... 359
R. E. Lee, Mg. Co., Rogers *vs*..... 491
Remer *vs*. Nesmith..... 495
Remick, Williamette Falls Co. *vs*.... 440
Rendall, Evans *vs*..... 187
Rentoul, Delogey *vs*..... 132
PAGE.
Requa, Isaac L..... 93
Rex *vs*. Alberbury..... 509
Rex *vs*. Brettell..... 509
Rex *vs*. Cumberland..... 126
Rex *vs*. Dunsford..... 509
Rex *vs*. Sedgley..... 509
Reynolds, Joshua S..... 177
Reynolds *vs*. Kay..... 514
Reynolds Lode.....144, 180
Reynolds, T. H..... 257
Rhode Island Lode..... 84
Rhodes, State *vs*..... 591
Ricard, A..... 445
Richards, Lyle *vs*..... 493
Richardson *vs*. McNulty....488, 489, 516, 518, 524, 591, 593, 595
Rich *vs*. Davis & Co..... 520
Richmond Claim..... 360
Richmond, Marvin *vs*..... 132
Richmond Mg. Co., Eureka Mg. Co. *vs*.....239, 321, 352, 514, 591, 593, 598
Ricketts *vs*. Burnette..... 443
Ridge, A. J..... 91
Ridge Co., Antonie Co. *vs*..... 595
Riordan Lode..... 383
Ripley, Rutland M. Co. *vs*..... 493
Roach *vs*. Gray.....502, 595
Robbins, Moore *vs*..... 429
Roberts, Cooper *vs*.....104, 109, 521, 590, 591
Roberts *vs*. Cooper..... 495
Roberts, E. W..... 220
Robertson, Governeur's Heirs *vs*.... 193, 592
Robertson *vs*. Smith.....500, 501, 502, 520, 593
Roberts *vs*. Wilson.....502, 517, 594
Robinson Consolidated Mg. Co..... 416
Robinson, D. A..... 208
Robinson, Johnstone *vs*..... 416
Robinson, T..... 167
Roche, Jno..... 315
Rockwell Lode..... 116
Rodgers, Lincoln *vs*.....522, 593
Roedel, Oscar..... 215
Roe, Richard..... 540
Rogers *vs*. Cooney.....493, 522, 591, 594
Rogers, Farwell *vs*..... 126
Rogers, Joseph..... 257
Rogers, Lincoln *vs*.....522, 593
Rogers *vs*. R. E. Lee Mg. Co..... 491
Rogers *vs*. Soggs..... 491, 523, 590, 593
Rolfe, H. C..... 176
Rollings, Alfred..... 85
Rollins, J. A..... 333
Rondebush, Delmonico *vs*..... 491
Rooks, Wm. A..... 150
Roper, Darville *vs*..... 509
Roscoe Conkling Lode..... 315
Rose, A. W., Jr..... 260
Rosse *vs*. Wainman..... 510

PAGE.
Ross *vs.* Heintzen..... 525
Ross, John E..... 454
Rowand, Mutual Benefit Life Ins. Co. *vs*..... 440
Rowe *vs.* Bacigallupp..... 595
Ruby Hill Lode..... 360
Rupley *vs.* Welch .....491, 590, 591
Russell, Gonu *vs*..... 505
Russell, J. H., Lode ..... 221
Russell Lode..... 505
Russell *vs.* Russell..... 126
Rutherford *vs.* Greene.....106, 107
Rutland M. Co. *vs.* Ripley..... 493
Ryan, Harvey *vs.* (See Bryan)..... 501, 593, 595
Ryan, Patrick..... 191
Ryan, Strang *vs*.....490, 501, 507, 520, 595
Sacramento Lode, .....160, 202
Safford. Carroll *vs*.....241, 328
St. John *vs.* Kidd.....488, 499, 520, 593, 595
St. Louis Mine..... 159
St. Louis Public Schools, Kissell *vs.* 105
St. Louis Smelting & Refining Co... 233
St. Louis Smtg. and Ref'g Co. *vs.* Kemp ..... 424
San Augustin Mine..... 76
San Augustin Mg. Co..... 76
Sanborn, Lyell *vs*..... 514
Sanborn *vs.* Neilson..... 132
San Carlos Mine..... 253
Sanderson, J. S..... 287
Sanders, Samuel..... 345
Sandy Smelting Co..... 441
San Francisco Mg. Claim..... 318
San Xavier Mine..... 119
Sappington, Thomas..... 273
Sarah Ann Lode..... 93
Sargent, A. A.....75, 78, 84, 222
Savage Con. S. M. Co., Hunter *vs*... 500
Savage Lode..... 384
Savage, S. M. Co., Chase *vs*.....493, 523, 594, 595
Sayer, Geo. A..... 245
Scheel Lode..... 93
Schenck, Allen..... 164
Schoellkopf, C. E..... 215
Schoenberg, Isaac..... 154
Schulenberg *vs.* Harriman..... 466
Schweder, Jno. H..... 88
Schwerle, State *vs*..... 126
Scogin *vs.* Culver..... 264
Scogin, Smith..... 161
Seals, Fremont *vs*.....590, 591, 593
Seaman *vs.* Vawdrey..... 489
Searle Lode..... 177
Searl, North Leadville *vs*..... 274
Sears, J. P..... 312
Sears *vs.* Taylor.....490, 516, 594, 598
Seaton Mg. Co. *vs.* Davis..... 296
Seaward *vs.* Malotte..... 496
PAGE.
Seawell, W. M..... 88
Secretary *vs.* McGarrahan.....509, 590
Sedgley, Rex *vs*..... 509
Segus, John..... 155
Selden, Sheets *vs*..... 126
Senter, Adams M. Co. *vs*..... 491
Settembre *vs.* Putnam.....443, 513, 595
Seven-thirty Lode ..... 137
Seward *vs.* Malotte..... 496
Sewell, Arthur..... 543
Seymour, C. H..... 212
Seymour *vs.* Wood ..... 212
Shafer *vs.* Constans..... 490
Shaughnessy, M..... 281
Shawhan, Jones *vs*..... 440
Sheets *vs.* Seldon..... 126
Shellabarger and Wilson.....203, 225
Sheply *vs.* Cowan..... 359
Sherman *vs.* Buick.....109, 214, 462, 491
Sherman, Cumberland Coal Co. *vs*... 491
Shi Quong..... 188
Shi Shoon..... 188
Shively, Pollard *vs*..... 504
Shoo Fly Mine ..... 146
Shoo Fly *vs.* Mono..... 146
Shuffleton, J. H..... 218
Sickles, Wash., Alex. & Geo'town S. P. Co. *vs*..... 415
Silver Cliff, Townsite of, *vs.* State of Colorado..... 261
Silver Girdle Lode.....513, 514
Silver *vs.* Ladd..... 359
Silver Mine..... 543
Silver Ore Lode..... 140
Simmons, John J..... 179
Simons *vs.* Vulcan Oil Co..... 491
Simpson, Anderson *vs*..... 490
Simpson, Lobdell *vs*..... 478
Sims *vs.* Smith..... 593
Singer, William..... 92
Sitting Bull Mg. Claim..... 318
Skillman *vs.* Lockman..... 443
Skyrme *vs.* Occidental M. & M. Co... 500
Slide Lode..... 208
Smallhouse *vs.* The Kentucky Co.... 440
Smaw, Moore *vs*.....495, 514, 590, 591
Smelting Co., Kahn *vs*..... 514
Smiley, Levi..... 159
Smith, Atty.-General *vs*..... 510
Smith Bros..... 259
Smith, Burage *vs*.....524, 590, 604
Smith, Clarence..... 237
Smith and Clute *vs.* Vanclief.....237, 298
Smith *vs.* Doe.. ...491, 524, 525, 591, 593
Smith, Hill *vs*..... 478
Smith, Jacob..... 192
Smith *vs.* N. American M. Co....498, 502
Smith *vs.* O'Hara..... 478
Smith, Railroad *vs*.....103, 165
Smith, Robertson *vs*...501, 502, 520, 593
Smith, Sims *vs*..... 593
Smith, W. H..... 125

PAGE.
Smock, Robert B..... 241
Smuggler Lode..... 400
Smythe, Reiche *vs*..... 359
Soda Lode..... 312
Soda Springs Sulphur Mine..... 266
Soggs, Rogers *vs*.....491, 523, 590, 593
Solambo C. M. Co., Morton *vs*...502, 512, 590, 591, 593, 595
Solid Muldoon Mine..... 543
Songer, Wm..... 291
Soulard *vs*. U. S..... 486
Southeast Extension of the Hale & Norcross Lode..... 93
Southern Cross G. & S. M. Co. *vs*. Europa M. Co..... 503
South Star Mine..... 347
Sparrow *vs*. Strong....456, 590, 591, 592
Spencer, Copper Hill Mg. Co. *vs*..... 595
Spencer, Lessees of French *vs*..... 241
Spencer *vs*. Winselman..... 525
Spooner, Myers *vs*.....488, 504, 505, 595
Spicer *vs*. Gesleman..... 174
Spiegelberg *vs*. Clark..... 421
Spriggs, Jno..... 343
Spring Creek W. & M. Co., Tartar *vs*..... 523, 578, 591
Spring, Eclipse G. & S. Mg. Co. *vs*. 505
Spring Hill Mine..... 459
Sprowl, Robert..... 342
Sprucemont Mg. Co..... 210
Squires, F. A..... 208
Stapleton Lode..... 194
Stark *vs*. Starrs...171, 212, 224, 239, 241
Star Q. M. Co., Van Duzen *vs*..... 491
Starr, Kemp *et al. vs*..... 234
Starr Placer..... 232
Starrs, Stark *vs*...171, 212, 224, 239, 241
Starr, Thomas.....232, 424
State *vs*. Berryman..... 513
State *vs*. Gascon..... 126
State *vs*. Moore.....456, 593
State of California.....101, 224
State of California, Amador City *vs*. 101
State of California, Hogden *vs*..... 342
State of California, Keystone Cons. Mg. Co. *vs*.....101, 340
State of California *vs* Poley and Thomas..... 212
State of Colo., Townsite of Silver Cliff *vs*..... 261
State of Missouri, Howe *vs*..... 108
State of Nebraska, Morton *vs*..... 478
State of Nevada *vs*. Real Del Monte G. & S. M. Co..... 497
State *vs*. Rhodes..... 591
State *vs*. Schwerle..... 126
Steam Tug, White *vs*..... 271
Stevens & Leiter *vs*. Murphy..... 452
Stevens, C. H..... 273
Stevenson, W..... 257
Stevenson *vs*. Williams..... 505
Stewart, Andrew I..... 134
PAGE.
Stewart *vs*. Chadwick.....511, 524
Stewart, O. C..... 315
Stewart, Wm. M..... 475
Stoakes *vs*. Barrett.....478, 590, 591
Stoakes *vs*. Monroe..... 493
Stoddard *vs*. Chambers..... 265
Stoddard, Thomas N..... 83
Stone *vs*. Bumpus..... 593
Stone *vs*. Geyser Q. M. Co.....488, 489, 595
Stone, Magee *vs*..... 492
Stone, U. S *vs*..... 265
Storey Co., Hale and Norcross G. & S. M. Co., *vs*.....512, 593
Strang *vs*. Ryan...490, 501, 507, 520, 595
Stranahan, Table Mtn. Co. *vs*...496, 502, 506, 513, 518, 592, 593, 595
Strange, Jerry..... 268
Streeter, E. S.....133, 190, 205
Streeter, McMurdy *vs*.....190, 210
Streeter *vs*. M. K. T. R.R..... 271
Streeter, Morse *vs*.....205, 216
Strong, Sparrow *vs*....456, 590, 591, 592
Stroud *vs*. Railway Co.....591, 604
Strout, Capron *vs*.....440, 500
Stryker *vs*. Cassiday..... 440
Stuart Mining Co..... 273
Su Hang..... 188
Sullivan *vs*. Hense....494, 501, 503, 506, 507, 594, 595
Sulphur King Mine..... 230
Sunshine Mg. Co..... 223
Susquehanna Co. *vs*. Quick..... 490
Sutro, A.....10, 11, 12, 22, 25, 98, 197, 226, 302, 603
Sutro Mine..... 318
Sutro Tunnel Co..... 302
Sutro Tun. Co. *vs*. Occidental Mill & Mg. Co..... 225
Sutter, Curtis *vs*..... 456
Swan, Gordon *vs*..... 494
Sweet, J. P.....192, 193
Swift, Moresi *vs*..... 521
Sylvester, Noble *vs*..... 488
Table Mtn. Co. *vs*. Stranahan...496, 502, 506, 513, 518, 592, 593, 595
Tabor *vs*. Dexter.....453, 506
Tabor, H. A. W..... 543
Tagliabue, F..... 318
Tappan, Maye *vs*.....492, 525, 595
Tarbet, Alex..... 347
Tarbet, Flagstaff S. M. Co. of Utah *vs*.....277, 347, 591, 593
Tarbet, Helen.....277, 347
Tartar *vs*. Spring Creek W. & M. Co.....478, 523, 591
Tascher, Jacob..... 84
Taylor *vs*. Castle.....443, 595
Taylor, Goldberg *vs*..... 490
Taylor, John H..... 313
Taylor, Kelley *vs*.....168, 506, 595
Taylor, Mining Co. *vs*..... 595

PAGE.
Taylor, Norris *vs*..... 491
Taylor *vs*. Parry..... 493
Taylor, Sears *vs*.. .....490, 516, 594, 598
Taylor, Union Cons. M. Co. *vs*..... 501, 523, 595
Terrible Lode..... 80
Territory *vs*. Lee.....492, 591, 594
Terry *vs*. Megerle..... 105
Thomas, Henry..... 212
Thompson, H. O..... 544
Thompson *vs*. Noble..... 510
Thor Mine..... 217
Thorne *vs*. Mosher..... 126
Thorn, James G..... 136
Thorp *vs*. Freed..... 478
Thorp *vs*. Woolman..... 478
Tioga South Mg. Claim..... 318
Tip Top Claim..... 360
Titcomb *vs*. Kirk. (See Jennison)... 590, 591, 592, 593, 595, 597
Titus Lode..... 347
Tomay, Jno..... 315
Tombstone, Townsite of..... ... 329
Tootle, Hanna *et al*..... 194
Topsey Mine ..... .. 267
Totten, Enoch..... 158
Townsite of Amador City *vs*. State of California..... 101
Townsite of Central City...183, 263, 345
Townsite of Coalville..... 343
Townsite of Deadwood..... 324
Townsite of Ingleside..... 324
Townsite of North Leadville *vs*. Searl..... 274
Townsite of Silver Cliff *vs*. State of Colorado..... 261
Townsite of Tombstone..... 329
Towsley, Johnson *vs*...212, 224, 429, 430
Toy Long, Chapman *vs*....492, 498, 515, 591, 593, 597, 599
Trafton *vs*. Nougues.....500, 501
Tralk, Quirk *vs*.....593, 595
Trippe, T. M..... 195
True, C..... 445
Turck, John.....144, 179
Tuscarora Lode..... 194
Tyler *vs*. Wilkinson..... .... 478
Tyson, Harris *vs*..... ..... 509
Uncle Sam G. & S. M. Co., Mallett *vs*....488, 499, 501, 511, 513, 517, 523, 591, 594, 595
Uncle Sam Co., Oreamuno *vs*..... 488, 499, 501, 595
Underwood, Bridge *vs*. .....591, 593
Underwood, Burge *vs*..... 478
Union Company's Mine..... 218
Union Cons. M. Co. *vs*. Taylor ..... 501, 523
Union M. Co. *vs*. Danberg..... 514
Union M. Co. *vs*. Ferris..... 514
Union Pac. R.R. Co..... 338, 34
Union Pac. R.R. Co. *vs*. Crismon... 340
PAGE.
Union Tunnel Lode..... 281
United States *vs*. Castillero..... 498
United States *vs*. Gear..... .....510, 590
United States *vs*. Gomez..... 250
United States *vs*. Gratiot..... 590
United States *vs*. Nelson..... 523
United States *vs*. Parrot.....590, 591
United States, Soulard *vs*..... 486
United States *vs*. Stone..... 265
United States *vs*. Waitz..... 492
Ursula, Don Julian..... 251
Urton, Fitzgerald *vs*.....478, 593
Valle de los Tulares..... 251
Valle, Nerce..... 187
Valpy, Dickinson *vs*..... .....443, 514
Vance, G. E..... 219
Van Clief, Smith *vs*..... 237, 298
Van Duzen *vs*. Star Q. M. Co ..... 491
Van Gorder, Chas. H..... 336
Van Valkenberg *vs*. McCloud..... 105
Van Valkenburg *vs*. Huff...491, 508, 594
Van Zandt *vs*. Argentine Mg. Co.... 410
Varnes, James A..... ..... 92
Vaughn, Butte Canal & Ditch Co. *vs*. 478
Vawdrey, Seaman *vs*..... 489
Veeder *vs*. Guffey..... 108
Ventich, Nicholas..... 297
Venus Mine..... 216
Vestel, N. S..... 268
Veto Lode..... ..... 85
Vial, Chumasero *vs* ..... 512
Victoria Mine..... ..... 253
Victor, Lentz *vs*.....516, 519, 590, 591
Vivian Mine..... 259
Vizina Cons. Mg. Co ..... 329
Vizina Mg. Claim..... 329
Von Schmidt *vs*. Huntington..... 499
Vulcan Oil Co., Simons *vs*..... 491
Vulture Mine..... ..... 543
Waddle, Thomas..... 338
Wainman, Rosse *vs*..... 510
Waitz, U. S. *vs*..... 492
Walker, Joseph R.....116, 164
Walker, Samuel S..... 164
Wallace, J. S..... 331
Walsh *vs*. Boyle..... ..... 126
Wandering Boy *vs*. Highland Chief. 162
Wandering Boy Lode..... 166
War Eagle Mine..... ..... 113
Waring *vs*. Crow.....489, 497, 516, 523, 524, 595
Warner, Cann *vs*..... ..... 126
Warren, G. W..... ..... 75
Warren, Hussey..... ..... 154
Warren, Jackson *vs*..... 271
Washington, Alex. and Geo'town S. P. Co. *vs*. Sickles.... ..... 415
Washington Lode.....85, 87, 315
Water Co., Broder *vs*.....322, 478
Water Co. *vs*. Mooney..... 595
Water Co., Wixon *vs*..... 491
Waterford, Laird *vs*.....591, 593

PAGE.
Waterman, Isaac S.....159, 202
Watson, Aiken *vs*..... 440
Watson, Alex. G..... 541
Watson, Hancock *vs*..... 497
Watson, Samuel..... 137
Watson, W. A..... 156
Watts *vs*. White..... 494
Weatherspoon *vs*. Duncan..... 328
Weaver, Conger *vs*.....456, 590, 591
Weeks *vs*. Hull..... 126
Wegener, P. O..... 97
Weill *vs*. Lucerne M. Co....488, 495, 507, 520, 594, 595
Weimer *vs*. Lowery. (See Wermer)... 591
Weise, A. V..... 182
Welch, James..... 379
Welch, John..... 379
Welch, Rupley *vs*.....491, 590, 591
Wellington, Prince of Wales *vs*..... 162
Wells, Ebenezer T..... 85
Wendell, Polk's Lessee *vs*..... 427
Wermer *vs*. Lowery. (See Weimer).. 478
West *vs*. Cochran..... 105
Western Pacific R.R. Co..... 510
Weymouth, Page *vs*..... 126
Whedon, D. P..... 217
Wheeler, A. D..... 187
Wheeler, Caruthers *vs*..... 126
Wheeler, C. T..... 291
Wheel of Fortune Lode..... 301
White Lode..... 184
White *vs*. Steam Tug..... 271
White, Watts *vs*..... 494
Whiting, John H..... 83
Whitney *vs*. Frisbie..... 241
Whitney, Frisbie *vs*..... 451
Whittier, Charles A..... 543
Wicks, Hobart *vs*..... 478
Wiggins *vs*. Peters..... 126
Wilder, E. B..... 216
Wild, H. B..... 340
Wildman Quartz Mine.....224, 291
Wilkinson *vs*. Gaston..... 126
Wilkeson, Moore *vs*..... 427
Wilkinson, Moxon *vs*.....490, 515, 518, 591, 594, 599
Wilkinson, Tyler *vs*..... 478
Willamette Falls Co. *vs*. Remick.... 440
Willard, G. K..... 218
Willett, Clark *vs*..... 593
Williams & Carpenter..... 83
PAGE.
Williams, Depuy *vs*.....489, 593, 595
Williams, E. H..... 171
Williams *vs*. Morland..... 478
Williams, Palmer *vs*..... 491
Williams, Stevenson *vs*..... 505
Willis, Gashwiler *vs*..... 494
Wilson, Bigelow *vs*..... 126
Wilson *vs*. Cleveland..... 595
Wilson, Morenhaut *vs*.....488. 595
Wilson, Roberts *vs*.....502, 517, 594
Wilson & Taylor..... 215
Winder, Hess *vs*.....415, 421. 493, 499, 511, 517, 593, 595
Wing, Gorham *vs*..... 126
Winnebago Lode..... 180
Winn, Patterson *vs*..... 429
Winselman, Spencer *vs*..... 524
Winslow, C. F..... 216
Winter, Micklethwait *vs*..... 510
Winters, Thomas..... 445
Wiseman *vs*. McNulty.....499, 523, 595
Witherspoon *vs*. Drake.....265, 266
Witherspoon *vs*. Duncan..... 241
Wixon *vs*. Bear River Co...491, 590, 591, 593
Wolfley *vs*. Lebanon Mg. Co.. 490, 506, 508, 514, 515, 522, 593, 594, 597
Wong Chung..... 188
Wong Loong..... 188
Wood, H. Clay..... 122
Woodhouse, Fairbanks *vs*...499, 594, 595
Wood *vs*. Hyde..... 137
Woods, Crandall *vs*..... 591
Wood, Seymour *vs*..... 212
Woodville Placer..... 224
Woodward & Walsh..... 220
Wood, W. S..... 192
Woolman *vs*. Garringer..... 478
Woolman, Thorp *vs*..... 478
Wooster, S. H..... 273
Wren, Thomas..... 353
Wright *vs*. Oroville M. Co..... 497
Wyoming Coal & Mg. Co..... 338
Wyoming Mine..... 91
X Sulphur Mine..... 230
Yoakum, Jno..... 339
Yosemite Mine..... 193
Young Columbia Lode..... 166
Young, John C..... 237
Zella Lode..... 116
Zollars *vs*. Evans..... 511

# PART I.—LAWS.

## I.—REVISED MINING STATUTES OF THE UNITED STATES.

SECTION 2318. Mineral lands reserved.
2319. Mineral lands open to purchase by citizens.
2320. Length of mining-claims upon veins or lodes.
2321. Proof of citizenship.
2322. Locators' rights of possession and enjoyment.
2323. Owners of tunnels, rights of.
2324. Regulations made by miners; expenditures and improvements.
2325. Patents for mineral lands, how obtained.
2326. Adverse claim, proceedings on.
2327. Description of vein-claims on surveyed and unsurveyed lands.
2328. Pending applications; existing rights.
2329. Conformity of placer claims to surveys, limits of.
2330. Subdivision of ten-acre tracts, maximum of placer locations.
2331. Conformity of placer claims to surveys, limitation of claims.
2332. What evidence of possession, etc., to establish a right to a patent.
2333. Proceedings for patent for placer-claim, etc.
2334. Surveyor-General to appoint surveyors of mining-claims, etc.
2335. Verification of affidavits, etc.
2336. Where veins intersect, etc.
2337. Patents for non-mineral lands, etc.
2338. What conditions of sale may be made by local legislature.
2339. Vested rights to use of water for mining, etc., right of way for canals.
2340. Patents, pre-emptions and homesteads, subject to vested water-rights.
2341. Lands in which no valuable mines are discovered, open to homesteads.
2342. Mineral lands, how set apart as agricultural lands.
2343. Additional districts and officers, power of the President to provide.
2344. Provisions of this chapter not to affect certain rights.
2345. Mineral lands in certain States excepted.
2346. Grants of land to States or corporations not to include mineral lands.
2347. Entry of coal-lands.
2348. Pre-emption of coal-lands.
2349. Pre-emption claims of coal-lands to be presented within sixty days.
2350. Only one entry allowed.
2351. Conflicting claims.
2352. Rights reserved.

### SEC. 2318. MINERAL LANDS RESERVED.

In all cases, lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

### SEC. 2319. MINERAL LANDS OPEN TO PURCHASE BY CITIZENS.

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners

in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

SEC. 1 of the act of 1872 is the same as the above.

SEC. 1 of the act of 1866 is as follows: SEC. 1. That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining-districts, so far as the same may not be in conflict with the laws of the United States.

SEC 2320. LENGTH OF MINING-CLAIMS UPON VEINS OR LODES.

Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other.

SEC. 2 of the act of 1872 is the same as the above.

SEC. 4 of the act of 1866 is as follows: SEC. 4. That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises, according to the location and possession and plat aforesaid; and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country, and the local rules, laws, and customs of miners: *Provided*, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

SEC. 2321. PROOF OF CITIZENSHIP.

Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

The last clause of Sec. 7 of the act of 1872 is the same as the above, with this addition: "and nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever," which language is now in the last clause of Sec. 2326.

SEC. 2322. LOCATORS' RIGHTS OF POSSESSION AND ENJOYMENT.

The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another.

SEC. 3 of the act of 1872 is the same as the above.

SEC. 2323. OWNERS OF TUNNELS, RIGHTS OF.

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

SEC. 4 of the act of 1872 is the same as the above.

SEC. 2324. MINERS' REGULATIONS; EXPENDITURES AND IMPROVEMENTS.

The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located

after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein, until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.—[See Amendment of Feb. 11, 1875.]

SEC. 5 of the act of 1872, substitutes the words: "each year for each hundred feet," instead of the words, "by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter," in the cause relating to expenditures, otherwise the section is the same.

An act approved March first, eighteen hundred and seventy-three, amended Sec. 5, of the act of 1872, as follows: "That the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the tenth day of June, eighteen hundred and seventy-four."

An act approved June six, eighteen hundred and seventy-four, further extended the time for first annual expenditure to the first day of January, eighteen hundred and seventy-five. [See other amendatory acts following.]

SEC. 2325. PATENTS FOR MINERAL LANDS, HOW OBTAINED.

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat, previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of

the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended, or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

SEC. 6 of the act of 1872 is the same as the above.

SEC. 2 of the act of 1866 reads thus: SEC. 2. That whenever any person, or association of persons, claim a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land-office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

SEC. 3 of the act of 1866 is as follows: SEC. 3. That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land-office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land-office shall transmit to the General Land-Office said plat, survey, and description, and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

SEC. 2326. ADVERSE CLAIM, PROCEEDINGS ON.

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended, or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified to by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court, that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever.

SEC. 7 of the act of 1872 is the same as the above, except the omission of the clause relative to proof of citizenship, which is identical with Sec. 2321.

SEC. 6 of the Statute of 1866 is as follows: SEC. 6. That whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until a final settlement, and adjudication in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases.

SEC. 2327. DESCRIPTION OF VEIN-CLAIMS ON SURVEYED AND UNSURVEYED LANDS.

The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

SEC. 8 of the act of 1872 is the same as the above.

SEC. 2328. PENDING APPLICATIONS; EXISTING RIGHTS.

Applications for patents for mining-claims, under former laws now pending, may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter, where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

SEC. 9 of the act of 1872, reads thus: SEC. 9. That sections one, two, three, four and six of an act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining-claims now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining-claims heretofore issued under the act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.

SEC. 2329. CONFORMITY OF PLACER-CLAIMS TO SURVEYS; LIMIT OF.

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

The first clause of Sec. 12 of the act of 1870, 16 U. S. Stat. 217, was substantially the same as the above. [See note to Sec. 2330.]
See §§ 2319, 2331, 2334.

SEC. 2330. SUBDIVISION OF TEN-ACRE TRACTS; LIMIT OF PLACER LOCATIONS.

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona-fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona-fide* settler to any purchaser.

SEC. 12 of the act of 1870, is as follows: SEC. 12. That claims usually called "placers," including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims: *Provided*, That where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre: *Provided further*, That legal subdivisions of forty acres may be subdivided into ten-acre tracts; and that two

or more persons or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof: *And provided further*, That no location of a placer-claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona-fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona-fide* settler to any purchaser.

SEC. 2331. SURVEY OF PLACER-CLAIMS; LIMITATION OF.

Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision, a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

SEC. 10 of the act of 1872, is as follows: SEC. 10. That the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act, for obtaining patents to vein or lode claims; but where said placer-claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining-claims hereafter located shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant, but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands: *Provided*, That proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases: *And provided also*, That where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, said fractional portion of agricultural land may be entered by any party qualified by law for homestead or pre-emption purposes.

SEC. 16 of the act of 1870 reads thus: SEC. 16. That so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands: *Provided*, That all subdividing of surveyed lands into lots less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants: *And provided further*, That nothing herein contained shall require the survey of waste or useless lands.

SEC. 2332. EVIDENCE OF POSSESSION TO ESTABLISH RIGHT TO PATENT.

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim;

but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent.

SEC. 13 of the act of 1870, reads: SEC. 13. That where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim: *Provided however*, That nothing in this act shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent.

SEC. 2333. PROCEEDINGS FOR PATENT FOR PLACER-CLAIM, ETC.

Where the same person, association or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case* a patent shall issue for the placer-claim subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim, which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

* SEC. 11 of the act of 1872 is identical with the above, including the words following, in parenthesis, after the words "and in such case," (subject to the provisions of this act and the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy,) in place of the words, "subject to the provisions of this chapter."

SEC. 2334. SURVEYOR-GENERAL TO APPOINT SURVEYORS OF MINING-CLAIMS.

The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter, and, in case of excessive charges for publication, he may designate any newspaper pub-

lished in a land-district where mines are situated, for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land-office, which statement shall be transmitted with the other papers in the case to the Commissioner of the General Land Office.

SEC. 12 of the act of 1872, was the same as the above, with the following addition: "The fees of the register and the receiver shall be five dollars each for filing and acting upon each application for patent or adverse claim filed, and they shall be allowed the amount fixed by law for reducing testimony to writing, when done in the land-office, such fees and allowances to be paid by the respective parties; and no other fees shall be charged by them in such cases. Nothing in this act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July twenty-sixth, eighteen hundred and sixty-six, nor shall this affect any right acquired under said act; and nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the act entitled 'An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada,' approved July twenty-fifth, eighteen hundred and sixty-six."

SEC. 2335. VERIFICATION OF AFFIDAVITS, ETC.

All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided, on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

SEC. 13 of the act of 1872 is the same as the above.

SEC. 14 of the act of 1870 reads thus: SEC. 14. That all *ex parte* affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated.

SEC. 2336. WHERE VEINS INTERSECT, ETC.

Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection, but the subsequent location shall have the right of way through the space of intersection, for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

SEC. 14 of the act of 1872 is identical with the above.

SEC. 2337. PATENTS FOR NON-MINERAL LANDS, ETC.

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

SEC. 15 of the act of 1872 is the same as the above.

SEC. 2338. STATE OR TERRITORIAL LEGISLATION CONCERNING MINERAL LANDS.

As a condition of sale in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 5 of the act of 1866, is identical with the above.

SEC. 2339. VESTED RIGHTS TO USE OF WATER; RIGHT OF WAY FOR CANALS, ETC.

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 9 of the act of 1866, is the same as the above.

SEC. 2340. PATENTS, ETC., SUBJECT TO VESTED WATER-RIGHTS.

All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

SEC. 17 of the act of 1870, reads thus: SEC. 17. That none of the rights conferred by sections five, eight and nine of the act to which this act is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the

construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

SEC. 2341. NON-MINERAL LANDS OPEN TO HOMESTEADS.

Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this title relating to "Homesteads."

SEC. 10 of the act of 1866, is substantially the above with the addition of the following language, after the words "one hundred and sixty acres:" "Or said parties may avail themselves of the provisions of the act of Congress, approved May twentieth, eighteen hundred and sixty-two, entitled 'An act to secure homesteads to actual settlers on the public domain,' and acts amendatory thereof."

SEC. 2342. MINERAL LANDS, HOW SET APART AS AGRICULTURAL.

Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

SEC. 11 of the act of 1866, is as above.

SEC. 2343. POWER OF THE PRESIDENT TO PROVIDE DISTRICTS AND OFFICERS.

The President is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

SEC. 7 of the act of 1866, is identical with the above.

SEC. 2344. PROVISIONS OF THIS CHAPTER NOT TO AFFECT CERTAIN RIGHTS.

Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled, "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

For SEC. 17 of the act of 1870, see note to SEC. 2340, *ante*.

SEC. 8 of the act of 1866, reads: SEC. 8. That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

The last clause of SEC. 16 of act of 1872, reads as follows: "*Provided*, That nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."

SEC. 2345. MINERAL LANDS IN CERTAIN STATES EXCEPTED.

The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions in like manner as before the tenth day of May, eighteen hundred and seventy-two; and any *bona fide* entries of such lands within the States named, since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption, as other public lands.

Act of Feb. 18, 1873, is similar to the above.

SEC. 2346. WHAT GRANTS NOT TO INCLUDE MINERAL LANDS.

No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which, in all cases, are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Act of Jan. 30, 1865, 13 U. S. Stat. 567, is identical with the above.

SEC. 2347. ENTRY OF COAL-LANDS.

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter by legal subdivisions any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre, for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

SEC. 1, act of 1873, is the same as the above.

SEC. 2348. PRE-EMPTION OF COAL-LANDS.

Any person or association of persons severally qualified as above provided, who have opened and improved, or shall hereafter open and improve any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

SEC. 2, act of 1873, is the same as the above.

SEC. 2349. PRE-EMPTION OF COAL-LANDS; WHEN CLAIMS TO BE PRESENTED.

All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

SEC. 3, act of 1873, is to the same effect.

SEC. 2350. ONLY ONE ENTRY ALLOWED.

The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such section shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

SEC. 4, act of 1873, is the same as the above.

SEC. 2351. CONFLICTING CLAIMS.

In case of conflicting claims upon coal-lands where the improvements shall be commenced after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include as near as may be the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

SEC. 5, act of 1873, is identical with the above.

SEC. 2352. EXISTING RIGHTS.

Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of

March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

SEC. 6, act of 1873, is the same as the above.

## MISCELLANEOUS PROVISIONS.

SECTION 910. Possessory actions for recovery of mining titles.
2238. Fees and commissions of registers and receivers.
2258. Lands not subject to pre-emption.
2386. Title to town-lots subject to mineral rights.
2406. Public surveys extended over mineral lands.
2471. Penalty for false making or altering instruments concerning mineral lands in California.
2472. Penalty for false making or dating instruments concerning mineral lands on Mexican grants in California.
2473. Penalty for presenting false or counterfeited papers, or prosecuting fraudulent suit for mineral lands in California.

### SEC. 910. POSSESSORY ACTIONS CONCERNING MINING TITLES.

No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

SEC. 9, act of Feb. 27, 1865, 13 U. S. Stat. 441.

### SEC. 2238. REGISTERS' AND RECEIVERS' FEES AND COMMISSIONS.

Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:

1. A fee of one dollar for each declaratory statement filed and for services in acting on pre-emption claims.

2. A commission of one per centum on all moneys received at each receiver's office.

3. A commission to be paid by the homestead applicant, at the time of entry, of one per centum on the cash price, as fixed by law, of the land applied for; and a like commission when the claim is finally established, and the certificate therefor issued as the basis of a patent.

4. The same commission on lands entered under any law to encourage the growth of timber on western prairies, as allowed when the like quantity of land is entered with money.

5. For locating military bounty-land warrants, issued since the eleventh day of February, eighteen hundred and forty-seven, and for locating agricultural-college land-scrip, the same commission, to be paid by the holder or assignee of each warrant or scrip, as is allowed for sales of the public lands for cash, at the rate of one dollar and twenty-five cents per acre.

6. A fee, in donation cases, of five dollars for each final certificate for one hundred and sixty acres of land, ten dollars for three hundred and twenty acres, and fifteen dollars for six hundred and forty acres.

7. In the location of lands by States and corporations under grants from Congress for railroads and other purposes, (except for agricultural colleges,) a fee of one dollar for each final location of one hundred and

sixty acres; to be paid by the State or corporation making such location.

8. A fee of five dollars per diem for superintending public land sales at their respective offices; and, to each receiver, mileage in going to and returning from depositing the public moneys received by him.

9. A fee of five dollars for filing and acting upon each application for patent or adverse claim filed for mineral lands, to be paid by the respective parties.

10. Registers and receivers are allowed, jointly, at the rate of fifteen cents per hundred words for testimony reduced by them to writing for claimants, in establishing pre-emption and homestead rights.

11. A like fee is provided in the preceding subdivision, when such writing is done in the land-office, in establishing claims for mineral lands.

12. Registers and receivers in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana, are each entitled to collect and receive fifty per centum on the fees and commissions provided for in the first, third, and tenth subdivisions of this section.

The subdivisions, 9 and 11, relating to mineral lands, are substantially like SEC. 12 of act of 1872.

SEC. 2258. LANDS NOT SUBJECT TO PRE-EMPTION.

The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of pre-emption, to wit:

1. Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose.

2. Lands included within the limits of any incorporated town, or selected as the site of a city or town.

3. Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

4. Lands on which are situated any known salines or mines.

SEC. 10, act of Sept. 4, 1841, 5 U. S. Stat. 455.

SEC. 2386. TITLE TO TOWN-LOTS SUBJECT TO MINERAL RIGHTS.

Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town-lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes, as against the United States.

SEC. 2, act of March 3, 1865, 13 U. S. Stat. 530.

SEC. 2406. PUBLIC SURVEYS EXTENDED OVER MINERAL LANDS.

There shall be no further geological survey by the Government, unless hereafter authorized by law. The public surveys shall extend over all mineral lands; and all subdividing of surveyed lands into lots less than one hundred and sixty acres may be done by county and local surveyors at the expense of claimants; but nothing in this section contained shall require the survey of waste or useless lands.

SEC. 9, act of 1870, 16 U. S. Stat. 218.

SEC. 2471. PENALTY FOR OFFENCES CONCERNING MINERAL LANDS IN CALIFORNIA.

Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counterfeited; or willingly aids and assists in the false making, altering, forging, or counterfeiting any petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente, or part of an expediente, or any title-paper, or evidence of title, right, or claim to lands, mines, or minerals in California, or any instrument of writing whatever in relation to lands or mines or minerals in the State of California, for the purpose of setting up or establishing against the United States any claim, right, or title to lands, mines, or minerals within the State of California, or for the purpose of enabling any person to set up or establish any such claim; and every person, who, for such purpose, utters or publishes as true and genuine any such false, forged, altered, or counterfeited petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, title-paper, evidence of right, title, or claim to lands or mines or minerals in the State of California, or any instrument of writing whatever in relation to lands or mines or minerals in the State of California, shall be punishable by imprisonment at hard labor not less than three years and not more than ten years, and by a fine of not more than ten thousand dollars.

SEC. 1, act of May 18, 1858, 11 U. S. Stat. 290.

SEC. 2472. PENALTY FOR FALSELY DATING TITLE-PAPERS.

Every person who makes, or causes or procures to be made, or willingly aids and assists in making any fasely dated petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, or any title-paper, or written evidence of right, title, or claim, under Mexican authority, to any lands, mines, or minerals in the State of California, or any instrument of writing in relation to lands or mines or minerals in the State of California, having a false date, or falsely purporting to be made by any Mexican officer or authority prior to the seventh day of July, eighteen hundred and forty-six, for the purpose of setting up or establishing any claim against the United States to lands or mines or minerals within the State of California, or of enabling any person to set up or establish any such claim; and every person who signs his name as governor, secretary, or other public officer acting under Mexican authority, to any instrument of writing falsely purporting to be a grant, concession, or denouncement under Mexican authority, and during its existence in California, of lands, mines, or minerals, or falsely purporting to be an informe, report, record, confirmation, or other proceeding on application for grant, concession, or denouncement under Mexican authority, during its existence in California, of lands, mines, or minerals, shall be punishable as prescribed in the preceding section.

SEC. 2, act of May 18, 1858, 11 U. S. Stat. 291.

SEC. 2473. PENALTY FOR PRESENTING FALSE EVIDENCE.

Every person who, for the purpose of setting up or establishing any

claim against the United States to lands, mines, or minerals within the State of California, presents, or causes or procures to be presented, before any court, judge, commission, or commissioner, or other officer of the United States, any false, forged, altered, or counterfeited petition, certificate, order, report, decree, concession, denouncement, deed, patent, diseño, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim to lands, minerals, or mines in the State of California, knowing the same to be false, forged, altered, or counterfeited, or any falsely dated petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim to lands, mines, or minerals in California, knowing the same to be falsely dated; and every person who prosecutes in any court of the United States, by appeal or otherwise, any claim against the United States for lands, mines, or minerals in California, which claim is founded upon, or evidenced by, any petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim, which has been forged, altered, counterfeited, or falsely dated, knowing the same to be forged, altered, counterfeited, or falsely dated, shall be punishable as prescribed in section twenty-four hundred and seventy-one.

SEC. 3, act of May 18, 1858, 11 U. S. Stat. 291.

SEC. 5596. REPEAL PROVISIONS.

All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general or permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local, or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local, or temporary character, contained in any of said acts; but the same shall remain in force; and all acts of Congress passed prior to said last named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment.—*These statutes were approved June* 22, 1874.

## No. 2. LODE AND WATER LAW OF JULY 26, 1866.

AN ACT granting the right of way to ditch and canal owners over the public lands and for other purposes.

*Be it enacted, etc.*, That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

SEC. 2. *And be it further enacted*, That whenever any person, or association of persons, claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

SEC. 3. *And be it further enacted*, That upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the General Land Office said plat, survey, and description, and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

SEC. 4. *And be it further enacted*, That when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys, to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid; and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners: *Provided*, That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules: *And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

SEC. 5. *And be it further enacted*, That as a further condition of sale,

in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

SEC. 6. *And be it further enacted*, That whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases.

SEC. 7. *And be it further enacted*, That the President of the United States be, and is hereby, authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

SEC. 8. *And be it further enacted*, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

SEC. 9. *And be it further enacted*, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 10. *And be it further enacted*, That wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or said parties may avail themselves of the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

SEC. 11. *And be it further enacted*, That upon the survey of the lands aforesaid, the Secretary of the Interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

Approved July 26, 1866.

## No. 8. PLACER LAW OF JULY 9, 1870.

AN ACT to amend "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes."

*Be it enacted, etc.*, That the act granting the right of way to ditch and canal owners over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby, amended by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act.

SEC. 12. *And be it further enacted*, That claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims: *Provided*, That where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre: *Provided further*, That legal subdivisions of forty acres may be subdivided into ten-acre tracts; and that two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof: *And provided further*, That no location of a placer claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

SEC. 13. *And be it further enacted*, That where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim: *Provided, however*, That nothing in this act shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

### LAWS.

SEC. 14. *And be it further enacted*, That all *ex parte* affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated.

SEC. 15. *And be it further enacted*, That registers and receivers shall receive the same fees for services under this act as are provided by law for like services under other acts of Congress, and that effect shall be given to the foregoing act according to such regulations as may be prescribed by the Commissioner of the General Land Office.

SEC. 16. *And be it further enacted*, That so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights, and for other purposes," as provides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands: *Provided*, That all subdividing of surveyed lands into lots less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants: *And provided further*, That nothing herein contained shall require the survey of waste or useless lands.

SEC. 17. *And be it further enacted*, That none of the rights conferred by sections five, eight, and nine, of the act to which this act is amendatory, shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

Approved July 9, 1870.

## No. 4. TABLE OF PARALLEL REFERENCES.

| | Revised Statutes. |
|---|---|
| Act of July 26th, 1866, 14 U. S. Stats. 252. | |
| Sec. 1 | (Sec. 2319.) |
| Sec. 2 | (Sec. 2325.) |
| Sec. 3 | (Sec. 2325.) |
| Sec. 4 | (Sec. 2320.) |
| Sec. 5 | (Sec. 2338.) |
| Sec. 6 | (Sec. 2326.) |
| Sec. 7 | (Sec. 2343.) |
| Sec. 8 | |
| Sec. 9 | (Sec. 2339.) |
| Sec. 10 | (Sec. 2341.) |
| Sec. 11 | (Sec. 2342.) |
| Act of July 9th, 1870, 16 U. S. Stats., 218. | |
| Sec. 12 | (Secs. 2329, 2330.) |
| Sec. 13 | (Sec. 2332.) |
| Sec. 14 | (Sec. 2335.) |
| Sec. 15 | |
| Sec. 16 | |
| Sec. 17 | (Secs. 2340, 2344.) |
| Act of May 10th, 1872, 17 U. S. Stats. 91. | |
| Sec. 1 | (Sec. 2319.) |
| Sec. 2 | (Sec. 2320.) |
| Sec. 3 | (Sec. 2322.) |
| Sec. 4 | (Sec. 2323.) |
| Sec. 5 | (Sec. 2324.) |
| Sec. 6 | (Sec. 2325.) |
| Sec. 7 | (Secs. 2321, 2326.) |
| Sec. 8 | (Sec. 2327.) |
| Sec. 9 | (Sec. 2328.) |
| Sec. 10 | (Sec. 2331.) |
| Sec. 11 | (Sec. 2333.) |
| Sec. 12 | (Secs. 2334, 2344.) |
| Sec. 13 | (Sec. 2335.) |
| Sec. 14 | (Sec. 2336.) |
| Sec. 15 | (Sec. 2337.) |
| Sec. 16 | (Sec. 2344.) |

| Revised Statutes. | |
|---|---|
| Sec. 2319 | Sec. 1, Act of 1872. |
| Sec. 2320 | Sec. 2, Act of 1872. |
| Sec. 2321 | Sec. 7, Act of 1872. |
| Sec. 2322 | Sec. 3, Act of 1872. |
| Sec. 2323 | Sec. 4, Act of 1872. |
| Sec. 2324 | Sec. 5, Act of 1872. |
| Sec. 2325 | Sec. 6, Act of 1872. |
| Sec. 2326 | Sec. 7, Act of 1872. |
| Sec. 2327 | Sec. 8, Act of 1872. |
| Sec. 2328 | Sec. 9, Act of 1872. |
| Sec. 2329 | Sec. 12, Act of 1870. |
| Sec. 2330 | Sec. 12, Act of 1870. |
| Sec. 2331 | Sec. 10, Act of 1872. |
| Sec. 2332 | Sec. 13, Act of 1870. |
| Sec. 2333 | Sec. 11, Act of 1872. |
| Sec. 2334 | Sec. 12, Act of 1872. |
| Sec. 2335 | Sec 13, Act of 1872, and Sec. 14, Act of 1870. |
| Sec. 2336 | Sec. 14, Act of 1872. |
| Sec. 2337 | Sec. 15, Act of 1872. |

Revised Statutes.
Sec. 2338.....Sec. 5, Act of 1866.
Sec. 2339.....Sec. 9, Act of 1866.
Sec. 2340.....Sec. 17, Act of 1870.
Sec. 2341.....Sec. 10, Act of 1866.
Sec. 2342.....Sec. 11, Act of 1866.
Sec. 2343.....Sec. 7, Act of 1866.
Sec. 2344.....Sec. 17, Act of 1870, and Sec. 16, Act of 1872.

Revised Statutes.
Coal Land Law of March 3, 1873, 17 Stats. p. 607.
Sec. 2347.....Sec. 1, Act of 1873.
Sec. 2348.....Sec. 2. Act of 1873.
Sec. 2349.....Sec. 3, Act of 1873.
Sec. 2350.....Sec. 4, Act of 1873.
Sec. 2351.....Sec. 5, Act of 1873.
Sec. 2352.....Sec. 6, Act of 1873.
(The coal law contains six sections only.)

### No. 5. ACT OF FEBRUARY 18, 1873—STATES EXCEPTED.

An act in relation to mineral lands.

*Be it enacted, etc.*, That within the States hereinafter named, deposits or mines of iron and coal be, and they are hereby, excluded from the operations of an act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and said act shall not apply to the mineral lands situate and being within the States of Michigan, Wisconsin, and Minnesota, and that said lands are hereby declared free and open to exploration and purchase, according to the legal subdivisions thereof, as before the passage of said act; and that any *bona fide* entries of such lands within said States, since the passage thereof, may be patented without reference to the provisions of said act.

Approved February 18, 1873.

### No. 6. ACT OF MARCH 1, 1873—ANNUAL EXPENDITURE.

AN ACT to amend an act entitled "An act to promote the development of the mining resources of the United States."

*Be it enacted, etc.*, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the tenth day of June, eighteen hundred and seventy-four.

Approved March 1, 1873.

### No. 7. ACT OF JUNE 6, 1874—ANNUAL EXPENDITURE.

AN ACT to amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

*Be it enacted, etc.*, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five.

Approved June 6, 1874.

### No. 8. ACT OF FEBRUARY 11, 1875—TUNNEL AMENDMENT.

AN ACT to amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

*Be it enacted, etc.*, That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

Approved February 11, 1875.

### No. 9. ACT OF MAY 5, 1876—STATES EXCEPTED.

AN ACT to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

*Be it enacted, etc.*, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two, and all lands in said States shall be subject to disposal as agricultural lands.

Approved May 5, 1876.

### No. 10. ACT OF JANUARY 22, 1880.—AGENTS—ANNUAL EXPENDITURE.

AN ACT to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States, concerning mineral lands.

*Be it enacted, etc.*, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, That this section shall apply to all applications now pending for patents to mineral lands."

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January, succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

Approved January 22, 1880.

## SUPPLEMENT TO LAWS.

### No. 10½. ACT OF APRIL 26, 1882. AGENT—ADVERSE CLAIM—CITIZENSHIP OF APPLICANT.

**An act to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.**

*Be it enacted, etc.*, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant, cognizant of the facts stated, and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

Sec. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory. Approved, April 26, 1882.

The above law modifies the rulings on pages 124, 133, and 218, as to adverse claims—also the instructions on page 65, and the ruling on page 267, touching proof of citizenship of applicants for patent.

said Comstock lode; and the same right of way shall extend northerly and southerly on the course of said lode, either within the same, or east or west of the same; and also on or along any other lode which may be discovered or developed by the said tunnel.

Sec. 2. *And be further enacted*, That the right is hereby granted to the said A. Sutro, his heirs and assigns, to purchase at one dollar and twenty-five cents per acre, a sufficient amount of public land near the mouth of said tunnel for the use of the same, not exceeding two sections, and such land shall not be mineral land, or in the *bona fide* possession of other persons who claim under any law of Congress at the time of the passage of this act, and all minerals existing or which shall be discovered therein are excepted from this grant; that upon filing a plat of said land the Secretary of the Interior shall withdraw the same from sale, and upon payment for the same a patent shall issue. And the said A. Sutro, his heirs and assigns, are hereby granted the right to purchase, at five dollars per acre, such mineral veins and lodes within two thousand feet on each side of said tunnel as shall be cut, discovered, or developed by running and constructing the same, through its entire extent, with all the dips, spurs, and angles of such lodes, subject, however, to the provisions of this act, and to such legislation as Congress may hereafter provide: *Provided*, That the Comstock lode, with its dips, spurs, and angles, is excepted from this grant, and all other lodes, with their dips, spurs, and angles, located within the said two thousand feet,

## EXPENDITURE.

**AN ACT to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States, concerning mineral lands.**

*Be it enacted, etc.*, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, That this section shall apply to all applications now pending for patents to mineral lands."

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January, succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

Approved January 22, 1880.

## No. 11. ACT OF MARCH 3, 1881—SUITS AT LAW.

**An act to amend section twenty-three hundred and twenty-six of the Revised Statutes, relating to suits at law affecting the title to mining claims.**

*Be it enacted, etc.*, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office, nor be entitled to a patent for the ground in controversy, until he shall have perfected his title.

Approved March 3, 1881.

## No. 12. SUTRO CANAL ACT OF JULY 25, 1866.

**An act granting to A. Sutro the right of way, and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada.**

*Be it enacted, etc.*, That, for the purpose of the construction of a deep draining and exploring tunnel to and beyond the "Comstock lode," so-called, in the State of Nevada, the right of way is hereby granted to A. Sutro, his heirs and assigns, to run, construct, and excavate a mining, draining, and exploring tunnel, also to sink mining, working, or air shafts along the line or course of said tunnel, and connecting with the same at any point which may hereafter be selected by the grantee herein, his heirs or assigns. The said tunnel shall be at least eight feet high and eight feet wide, and shall commence at some point to be selected by the grantee herein, his heirs or assigns, at the hills near Carson river, and within the boundaries of Lyon county, and extending from said initial point in a westerly direction seven miles, more or less, to and beyond said Comstock lode; and the same right of way shall extend northerly and southerly on the course of said lode, either within the same, or east or west of the same; and also on or along any other lode which may be discovered or developed by the said tunnel.

Sec. 2. *And be further enacted*, That the right is hereby granted to the said A. Sutro, his heirs and assigns, to purchase at one dollar and twenty-five cents per acre, a sufficient amount of public land near the mouth of said tunnel for the use of the same, not exceeding two sections, and such land shall not be mineral land, or in the *bona fide* possession of other persons who claim under any law of Congress at the time of the passage of this act, and all minerals existing or which shall be discovered therein are excepted from this grant; that upon filing a plat of said land the Secretary of the Interior shall withdraw the same from sale, and upon payment for the same a patent shall issue. And the said A. Sutro, his heirs and assigns, are hereby granted the right to purchase, at five dollars per acre, such mineral veins and lodes within two thousand feet on each side of said tunnel as shall be cut, discovered, or developed by running and constructing the same, through its entire extent, with all the dips, spurs, and angles of such lodes, subject, however, to the provisions of this act, and to such legislation as Congress may hereafter provide: *Provided*, That the Comstock lode, with its dips, spurs, and angles, is excepted from this grant, and all other lodes, with their dips, spurs, and angles, located within the said two thousand feet,

and which are or may be, at the passage of this act, in the actual *bona fide* possession of other persons, are hereby excepted from such grant. And the lodes herein excepted, other than the Comstock lode, shall be withheld from sale by the United States; and if such lodes shall be abandoned or not worked, possessed, and held in conformity to existing mining rules, or such regulations as have been or may be prescribed by the legislature of Nevada, they shall become subject to such right of purchase by the grantee herein, his heirs or assigns.

SEC. 3. *And be it further enacted*, That all persons, companies, or corporations owning claims or mines on said Comstock lode or any other lode drained, benefited, or developed by said tunnel, shall hold their claims subject to the condition (which shall be expressed in any grant they may hereafter obtain from the United States) that they shall contribute and pay to the owners of said tunnel the same rate of charges for draining or other benefits derived from said tunnel or its branches, as have been, or may hereafter be, named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode at the time of the passage of this act.

Approved July 25, 1866.

### No. 13. TIMBER CUTTING ACT OF JUNE 3, 1878.

**AN ACT authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.**

*Be it enacted, etc.*, That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated, to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not exceeding five hundred

dollars, and to which may be added imprisonment for any term not exceeding six months.

Approved June 3, 1878.

### No. 14. TIMBER AND STONE LAW OF JUNE 3, 1878.

AN ACT for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory.

*Be it enacted, etc.*, That surveyed public lands of the United States within the States of California, Oregon, and Nevada, and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be

subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void.

SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land-office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land-office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

SEC. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offense a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or taking of timber for the use of the United States; and the penalties herein provided shall not take effect until ninety days after the passage of this act.

SEC. 5. That any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting

timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall cut or cause to be cut timber, or remove or cause to be removed the same: *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named.

SEC. 6. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Approved June 3, 1878.

### No. 15. SALINE LAW OF JANUARY 12, 1877.

AN ACT providing for the sale of saline lands.

*Be it enacted, etc.*, That whenever it shall be made appear to the register and the receiver of any land-office of the United States that any lands within their district are saline in character, it shall be the duty of said register and said receiver, under the regulation of the General Land Office, to take testimony in reference to such lands to ascertain their true character, and to report the same to the General Land Office; and if, upon such testimony, the Commissioner of the General Land Office shall find that such lands are saline and incapable of being purchased under any of the laws of the United States relative to the public domain, then, and in such case, such lands shall be offered for sale by public auction at the local land-office of the district in which the same shall be situated, under such regulations as shall be prescribed by the Commissioner of the General Land Office, and sold to the highest bidder for cash at a price not less than one dollar and twenty-five cents per acre; and in case said lands fail to sell when so offered, then the same shall be subject to private sale, at such land-office, for cash, at a price not less than one dollar and twenty-five cents per acre, in the same manner as other lands of the United States are sold: *Provided*, That the foregoing enactments shall not apply to any State or Territory which has not had a grant of salines by act of Congress, nor to any State which may have had such a grant, until either the grant has been fully satisfied, or the right of selection thereunder has expired by efflux of time. But nothing in this act shall authorize the sale or conveyance of any title other than such as the United States has, and the patents issued shall be in the form of a release and quit-claim of all title of the United States in such lands.

SEC. 2. That all Executive proclamations relating to the sales of public lands shall be published in only one newspaper, the same to be printed and published in the State or Territory where the lands are situated, and to be designated by the Secretary of the Interior.

Approved January 12, 1877.

## No. 16. COAL LAWS OF JULY 1, 1864, AND MARCH 3, 1865.

AN ACT for the disposal of coal lands and of town property in the public domain.

*Be it enacted, etc.*, That where any tracts embracing coal beds, or coal fields, constituting portions of the public domain, and which, as "mines," are excluded from the pre-emption act of eighteen hundred and forty-one, and which, under past legislation, are not liable to ordinary private entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder, after public notice of not less than three months, at a minimum price of twenty dollars per acre; and any lands not thus disposed of shall thereafter be liable to private entry at said minimum. * * [The other parts of this law concern only townsites.]

Approved July 1, 1864.

AN ACT supplemental to the act approved first July, eighteen hundred and sixty-four, "for the disposal of coal lands and of town property in the public domain."

*Be it enacted, etc.*, That in the case of any citizen of the United States who, at the passage of this act, may be in the business of *bona fide* actual coal mining on the public lands, except on lands reserved by the President of the United States for public uses, for purposes of commerce, such citizen, upon making proof satisfactory to the register and receiver to that effect, shall have the right to enter, according to legal subdivisions, a quantity of land not exceeding one hundred and sixty acres, to embrace his improvements and mining premises, at the minimum price of twenty dollars per acre, fixed in the coal and town property act of first July, eighteen hundred and sixty-four: *Provided*, That where the mining improvements and premises are on land surveyed at the passage of this act, a sworn declaratory statement descriptive of the tract and premises, showing also the extent and character of the improvements, shall be filed within six months from the date of this act, and proof and payment shall be made within one year from the date of such filing; but where such mining premises may be on lands hereafter to be surveyed, such declaratory statement shall be filed within three months from the return to the district land-office of the official township plat; and proof and payment shall be made within one year from the date of such filing. * * [The other portion of this law relates exclusively to townsites,]

Approved March 3, 1865.

[For coal law of 1873, see Revised Statutes, Sections 2347 to 2352 inclusive.]

# PART II.

# LAND OFFICE REGULATIONS.

## *a.* GENERAL CIRCULAR INSTRUCTIONS OF OCTOBER 31, 1881.

### MINERAL LANDS OPEN TO EXPLORATION, OCCUPATION, AND PURCHASE.

1. It will be perceived that by the foregoing provisions of law the mineral lands in the public domain, surveyed or unsurveyed, are open to exploration, occupation, and purchase, by all citizens of the United States and all those who have declared their intention to become such.

### STATUS OF LODE-CLAIMS LOCATED PRIOR TO MAY 10, 1872.

2. By an examination of the several sections of the Revised Statutes it will be seen that the *status* of lode-claims located *previous* to the 10th May, 1872, is not changed with regard to their *extent along the lode or width of surface.*

3. Mining rights acquired under such previous locations are, however, enlarged by said Revised Statutes in the following respect, viz: The locators of all such previously taken veins or lodes, their heirs and assigns, so long as they comply with the laws of Congress and with State, Territorial, or local regulations not in conflict therewith, governing mining claims, are invested with the exclusive possessory right of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such locations at the surface, it being expressly provided, however, that the right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end-lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of such outside portion of a vein or ledge to enter upon the surface location of another claimant.

4. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May* 10, 1872, and that where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

5. In order to hold the possessory title to a mining claim located prior

to May 10, 1872, and for which a patent has not been issued, the law requires that *ten dollars* shall be expended annually in labor or improvements on each claim of *one hundred feet* on the course of the vein or lode until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim; a failure to comply with this requirement in any one year subjecting the claim upon which such failure occurred to relocation by other parties, the same as if no previous location thereof had ever been made, unless the claimants under the original location shall have resumed work thereon after such failure and before such relocation. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended *annually* until patent issues. By decision of the honorable Secretary of the Interior, dated March 4, 1879, such annual expenditures are not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

6. Upon the failure of any one of several co-owners of a vein, lode, or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the co-owners who have performed the labor, or made the improvements, as required by said Revised Statutes, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners, who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

PATENTS FOR VEINS OR LODES HERETOFORE ISSUED.

7. Rights under patents for veins or lodes heretofore granted under previous legislation of Congress are enlarged by the Revised Statutes so as to invest the patentee, his heirs or assigns, with title to all veins, lodes, or ledges, throughout their entire depth, the top or apex of which lies within the end and side boundary-lines of his claim on the surface, as patented, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of the claim at the surface. The right of possession to such outside parts of such veins or ledges to be confined to such portions thereof as lie between vertical planes drawn downward through the end-lines of the claims at the surface, so con-

tinued in their own direction that such planes will intersect such exterior parts of such veins or ledges, it being expressly provided, however, that all veins, lodes, or ledges, the top or apex of which lies inside such surface locations, *other* than the one named in the patent, which were *adversely claimed on the 10th May*, 1872, are excluded from such conveyance by patent.

8. Applications for patents for mining claims pending at the date of the act of May 10, 1872, may be prosecuted to final decision in the General Land Office, and where no adverse rights are affected thereby, patents will be issued in pursuance of the provisions of the Revised Statutes.

MANNER OF LOCATING CLAIMS ON VEINS OR LODES AFTER MAY 10, 1872.

9. From and after the 10th May, 1872, any person who is a citizen of the United States or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

10. With regard to the extent of surface-ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface-rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end-lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on *either* side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet cannot be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery-shaft must be assumed to mark such point.

11. By the foregoing it will be perceived that no lode-claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface-ground of that width can be taken, depends upon the local regulations or State or Territorial laws in force in the several mining-districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

12. It is provided by the Revised Statutes that the miners of each district may make rules and regulations not in conflict with the laws of the United States, or of the State or Territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

13. The statutes provide that no lode-claim shall be recorded until after the discovery of a vein or lode within the limits of the claim located, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

14. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft, or run a tunnel or drift, to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery-shaft on the claim, to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, &c., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

15. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface-ground, and at the point of discovery or discovery-shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery-point.

16. Within a reasonable time, say twenty days after the location shall have been marked on the ground, or such time as is allowed by the local laws, notice thereof, accurately describing the claim in manner aforesaid, should be filed for record with the proper recorder of the district, who will thereupon issue the usual certificate of location.

17. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed, or improvements made thereon annually until entry shall have been made. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Expenditure made or labor performed prior to the first day of January succeeding the date of location will not be considered as a part of, or applied upon the first annual expenditure required by law. Failure to make the expenditure or perform the labor required will subject the claim to relocation by any other party having the necessary qualifications, unless the original locator, his heirs, assigns or legal representatives have resumed work thereon after such failure and before such relocation.

18. The expenditures required upon mining claims may be made from the surface or in running a tunnel for the development of such claims, the act of February 11, 1875, providing that where a person or company has, or may, run a tunnel for the purpose of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same.

19. The importance of attending to these details in the matter of location, labor, and expenditure will be the more readily perceived when it is understood that a failure to give the subject proper attention may invalidate the claim.

TUNNEL RIGHTS.

20. Section 2323 provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel.

21. The effect of this is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

22. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point

at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted, upon which prospecting is prohibited as aforesaid.

23. To avail themselves of the benefits of this provision of law, the proprietors of a mining-tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

24. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location defining the tunnel-claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

25. By a compliance with the foregoing much needless difficulty will be avoided, and the way for the adjustment of legal rights acquired in virtue of said section 2323 will be made much more easy and certain.

26. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels to the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a *reasonable diligence* on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

MANNER OF PROCEEDING TO OBTAIN GOVERNMENT TITLE TO VEIN OR LODE-CLAIMS.

27. By section 2325 authority is given for granting titles for mines by patent from the Government to any person, association, or corporation, having the necessary qualifications as to citizenship and holding the right of possession to a claim in compliance with law.

28. The claimant is required in the first place to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field-notes, in each case, will be prepared by the surveyor-general; one plat and the original field-notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field-notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land-district to be retained on his files for future reference.

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine, or lode; the mining-district and county; whether the location is of record, and, if so, where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery, or other well-defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims, &c.

30. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat, and the field-notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses, that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to, and form a part of, said affidavit.

31. Attached to the field-notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining-district, State or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

32. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz: Where he claims to be a locator, a full, true, and correct copy of such location should be furnished, as the same appears upon the mining

records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records; where the applicant claims as a locator in company with others who have since conveyed their interests in the lode to him, a copy of the original record of location should be filed, together with an abstract of title from the proper recorder, under seal or oath as aforesaid, tracing the co-locator's possessory rights in the claim to such applicant for patent; where the applicant claims only as a purchaser for valuable consideration, a copy of the location record must be filed, under seal or upon oath as aforesaid, with an abstract of title certified as above by the proper recorder, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record in his office other than those set forth in the accompanying abstract.

33. In the event of the mining records in any case have been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, &c.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession, and tend to establish his claim, should be filed.

34. Upon the receipt of these papers the register will, at the expense of the claimant, (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication,) publish a notice of such application for the period of sixty days, in a newspaper published nearest to the claim; and will post a copy of such notice in his office for the same period. In all cases sixty days must intervene between the first and the last insertion of the notice in such newspaper. When the notice is published in a *weekly* newspaper ten consecutive insertions are necessary; when in a *daily* newspaper the notice must appear in each issue for the required period.

35. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim.

36. Too much care cannot be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

37. The claimant, either at the time of filing these papers with the register, or at any time during the sixty days' publication, is required to file a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made upon the claim by the applicant or his grantors; that the plat filed by the claimant is correct; that the field-notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated into a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

38. It will be the more convenient way to have this certificate indorsed

by the surveyor-general, both upon the plat and field-notes of survey filed by the claimant as aforesaid.

39. After the sixty days' period of newspaper publication has expired the claimant will file his affidavit, showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

40. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field-notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land-office; after which the whole matter will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

41. In sending up the papers in the case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

42. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims.

43. The surveyor-general must continue to designate all surveyed mineral claims as heretofore by a progressive series of numbers, beginning with lot No. 37 in each township; the claim to be so designated at date of filing the plat, field-notes, &c., in addition to the local designation of the claim; it being required in all cases that the plat and field-notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the *locus* of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a remote distance from such public corner, in which latter case the reference by course and distance to permanent objects in the neighborhood will be a sufficient designation by which to fix the *locus* until the public surveys shall have been closed upon its boundaries.

ADVERSE CLAIMS.

44. Section 2326 provides for adverse claims, fixes the time within which they shall be filed to have legal effect, and prescribes the manner of their adjustment.

45. Said section requires that the adverse claim shall be filed during the period of publication of notice; that it must be on the oath of the adverse claimant; and that it must show the "*nature*," the "*boundaries*," and the "*extent*" of the adverse claim.

46. In order that this section of law may be properly carried into effect, the following is communicated for the information of all concerned:

47. An adverse mining claim must be filed with the register of the same land-office with whom the application for patent was filed, or in

his absence with the receiver, and within the sixty days' period of newspaper publication of notice.

48. The adverse notice must be duly sworn to by the person or persons making the same before an officer authorized to administer oaths within the land-district, or before the register or receiver; it will fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a mere verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

49. In order that the "*boundaries*" and "*extent*" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made.

50. Upon the foregoing being filed within the sixty days as aforesaid, the register, or in his absence the receiver, will give notice in writing to *both parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

51. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

52. The proceedings after rendition of judgment by the court in such case are so clearly defined by the act itself as to render it unnecessary to enlarge thereon in this place.

53. The proceedings to obtain patents for claims usually called pla-

cers, including all forms of deposit, are similar to the proceedings prescribed for obtaining patents for vein or lode-claims; but where said placer-claim shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat will be required, and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

54. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here; it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims, placer-claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

55. By section 2330, authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

56. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining-districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

57. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or of parallelograms five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented, in addition to the other *data* required in the notice.

58. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "S. E. ¼ of the S. W. ¼ of N. W. ¼," or, if in the form of a parallelogram as aforesaid, it may be described as the "W. ½ of the W. ½ of the S. W. ¼ of the N. W. ¼ (or the N. ½ of the S. ½ of the N. E. ¼ of the S. E. ¼) of section ———, township ———, range ———," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proof submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

Inasmuch as the surveyor-general has no duty to perform in connec-

tion with the entry of a placer-claim of legal subdivisions, the proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors.

59. Applicants for patent to a placer-claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement; and the vein or lode must be surveyed and marked upon the plat; the field-notes and plat giving the area of the lode-claim or claims and the area of the placer separately. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. It should be remembered that an application which omits to include an application for a known vein or lode therein, must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of claimant and one or more witnesses.

60. When an adverse claim is filed to a placer application, the proceedings are the same as in the case of vein or lode-claims, already described.

QUANTITY OF PLACER-GROUND SUBJECT TO LOCATION.

61. By section 2330 it is declared that no location of a placer-claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

62. Section 2331 provides that all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant.

63. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer-claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed one hundred and sixty acres, which location of one hundred and sixty acres cannot be made by a less number than eight *bona fide* locators; and no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much.

64. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations, so far as the same are applicable; the law requiring, however, that where placer-claims are upon *surveyed* public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

65. With regard to the proofs necessary to establish the possessory right to a placer-claim, section 2332 provides that "where such person

or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

66. This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

67. When an applicant desires to make his proof of possesory right in accordance with this provision of law, you will not require him to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will require him to furnish a duly certified copy of the statute of limitations of mining-claims for the State or Territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining-ground covered by his application; the area thereof, the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and *bona fides* which he may desire to submit in support of his claim.

68. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining-claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

69. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corrobative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

70. It will be to the advantage of claimants to make their proofs as full and complete as practicable.

MILL-SITES.

71. Section 2337 provides that "where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such

non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section."

72. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode, and to a piece of non-mineral land not contiguous thereto, for mining or milling purposes, not exceeding the quanity allowed for such purpose by section 2337 United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land-office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field-notes, may include, embrace, and describe, in addition to the vein or lode, such non-contiguous mill-site, and after due proceedings as to notice, &c., a patent will be issued conveying the same as one claim.

73. In making the survey in a case of this kind, the lode-claim should be described in the plat and field-notes as "Lot No. 37, A," and the mill-site as "Lot No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill-site to a corner of the lode-claim to be invariably given in such plat and field-notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill-site as well as upon the vein or lode for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill-site, but the whole area of both lode and mill-site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

74. In case the owner of a quartz-mill or reduction-works is not the owner or claimant of a vein or lode, the law permits him to make application therefor in the same manner prescribed herein for mining-claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill-site at said price per acre.

75. In every case there must be satisfactory proof that the land claimed as a mill-site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of the claimant, supported by that of one or more disinterested persons capable from acquaintance with the land to testify understandingly.

76. The law expressly limits mill-site locations made from and after its passage to *five acres*.

77. The registers and receivers will preserve an unbroken consecutive series of numbers for all mineral entries.

### PROOF OF CITIZENSHIP OF MINING-CLAIMANTS.

78. The proof necessary to establish the citizenship of applicants for mining-patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge, or upon information and belief, setting forth the resi-

dence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

79. In case of an individual or an association of individuals who do not appear by their duly authorized agent, you will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

80. In case an applicant has declared his intention to become a citizen, or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

81. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land-district. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

APPOINTMENT OF DEPUTY SURVEYORS OF MINING-CLAIMS—CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS AND RECEIVERS, &C.

82. Section 2334 provides for the appointment of surveyors of mineral-claims, authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications, prescribes the fees allowed to the local officers for receiving and acting upon applications for mining-patents and for adverse claims thereto, &c.

Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

*a*. Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body-type used for advertisements.

*b*. For the publication of citations in contests or hearings involving the character of lands, the charges shall not exceed eight dollars for five publications in weekly newspapers, or ten dollars for publications in daily newspapers for thirty days.

83. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land-district as many *competent* deputies for the survey of mining-claims as may seek such appointment; it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining-claimants and not by the United States; the system of making *deposits* for mineral surveys, as required by previous instructions, being hereby revoked as regards *field-work;* the claimant

having the option of employing *any* deputy surveyor within such district to do his work in the field.

84. With regard to the *platting* of the claim and other *office-work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer, or designated depository, in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

85. The surveyors-general will endeavor to appoint mineral deputy surveyors, so that one or more may be located in each mining-district for the greater convenience of miners.

86. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them.

The duty of the deputy mineral surveyor ceases when he has executed the survey and returned the field-notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining-claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land-office in connection with a mining-claim.

The surveyors-general and local land-officers are expected to report any infringement of this regulation to this office.

87. The law requires that each applicant shall file with the register and receiver a sworn statement of all charges and fees paid by him for publication of notice and for survey; together with all fees and money paid the register and receiver, which sworn statement is required to be transmitted to this office, for the information of the Commissioner.

88. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

89. The fees payable to the register and receiver for filing and acting upon applicatiens for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim.

90. All fees or charges under this law may be paid in United States currency.

91. The register and receiver will, at the close of each month, forward to this office an abstract of mining-applications filed, and a register of receipts, accompanied with an abstract of mineral lands sold, and an abstract of adverse claims filed.

92. The fees and purchase-money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

HEARINGS TO ESTABLISH THE CHARACTER OF LANDS.

93. In every case where it becomes necessary under the law and existing

instructions of this office that a hearing be held and testimony taken for the purpose of ascertaining the mineral or agricultural character of land, the local officers are directed to cause the evidence to be taken before a duly qualified officer whose office is located nearest the land in dispute, the distance to be computed by ordinary routes of travel.

Whenever the local office comes within this rule, the hearing will be held before the register and receiver.

It is intended to cause these hearings to be held, as far as practicable, in such manner as to afford the least inconvenience to persons interested. Should it appear, therefore, by written stipulation of all the parties that this purpose will best be subserved by the designation of any particular officer authorized to administer oaths within the land-district in which the land in controversy is situated, the instructions herein may be departed from in accordance with such stipulation. Such deviation may also be allowed where the officer who would, otherwise, be designated is an interested party, or where, for other good reason, his selection would be improper.

When the evidence is taken before an officer other than a register and receiver, the record should be sealed up, the title of the case indorsed on the envelope, and the whole returned by mail or express to the register and receiver.

On the 27th April, 1880, in accordance with the directions of the Secretary of the Interior, this office revoked the withdrawals theretofore made, upon general information, that vast tracts of public land were mineral in character, and instructed the local officers, in the absence of specific allegation of the mineral character of land to allow applications for agricultural entry thereof, upon due proof.

Hereafter the only tracts of public land that will be withheld from entry as agricultural land on account of its mineral character, will be such as are returned by the surveyor-general as mineral; and even the presumption which is supported by such return may be overcome by testimony taken at a regular hearing.

94. Hearings to determine the character of land, as practically distinguished, are of two kinds:

1st. Where lands which are sought to be entered and patented as agricultural are alleged by affidavit to be mineral, or when sought as mineral their non-mineral character is alleged.

The proceedings relative to this class are in the nature of a contest between two or more known parties, and the testimony may be taken on personal notice of at least ten days, duly served on all parties, or, if they cannot be found, then by publication, for thirty days in a newspaper of general circulation, to be designated by the register of the land-office as published nearest to the land in controversy. If publication is made in a weekly newspaper, the notice must be inserted in five consecutive weekly issues thereof.

2d. When lands are returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural, notice must be given by publication for thirty days, as aforesaid.

95. All notices must describe the land, give the name and address of the claimant, the character of his claim, and the time, place, and purpose of the hearing.

Proof of service of notice, when personal, must consist of either acknowledgment of service indorsed on the citation, (which is always desirable,) or the affidavit of the party serving the same, giving date, place, and manner of service, indorsed as aforesaid.

Proof of publication must be the affidavit of the publisher of the newspaper, stating the period of publication, giving dates, stating whether in a daily or weekly issue, and a copy of the notice so published must be attached to, and form a part of, the affidavit.

Proof of posting on the claim must be made by the affidavits of two or more persons who state when and where the notice was posted; that it remained so posted during the prescribed period, giving dates, and a copy of the notice so posted must be attached to, and made a part of, the affidavits.

Proof of notice is indispensable to the regularity of proceedings and must accompany the record in every case.

The expense of notice must in every case be paid by the parties thereto.

96. At the hearing there must be filed the affidavit of the publisher of the paper that the said notice was published for the required time, stating when and for how long such publication was made, a printed copy thereof to be attached and made a part of the affidavit.

97. At the hearing the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer-mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

98. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace his improvements, giving in detail the extent and value of his improvements, such as house, barn, vineyard, orchard, fencing, etc.

99. It is thought that *bona fide* settlers upon lands really agricultural will be able to show, by a clear, logical, and succinct chain of evidence, that their claims are founded upon law and justice; while parties who have made little or no permanent agricultural improvements, and who only seek title for speculative purposes, on account of the mineral deposits known to themselves to be contained in the land, will be defeated in their intentions.

100. The testimony should be as full and complete as possible; and, in addition to the leading points indicated above, everything of importance bearing upon the question of the character of the land should be elicited at the hearing.

101. Where the testimony is taken before an officer who does not use a seal, other than the register and receiver, the official character of such officer must be attested by a clerk of a court of record, and the testimony transmitted to the register and receiver, who will thereupon examine and forward the same to this office, with their joint opinion as to the character of the land as shown by the testimony.

102. When the case comes before this office, such an award of the land will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land in any forty-acre tract, the necessary instructions will be issued to enable the agricultural claimant, *at his own expense*, to have the work done, at his option, either by United States deputy, county, or other local surveyor; the survey in such case may be executed in such manner as will segregate the portion of land actually containing the mine, and used as surface-ground for the convenient working thereof, from the remainder of the tract, which remainder will be patented to the agriculturist to whom the same may have been awarded, subject, however, to the condition that the land may be entered upon by the proprietor of any vein or lode for which a patent has been issued by the United States for the purpose of extracting and removing the ore from the same, where found to penetrate or intersect the land so patented as agricultural, as stipulated by the mining act.

103. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

104. Upon the filing of the plat and field-notes of such survey, duly sworn to as aforesaid, you will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township-plat in his office, and furnish authenticated copies of such plat and description both to the proper local land-office and to this office, to be affixed to the duplicate and triplicate township-plats respectively.

105. In cases where a portion of a forty-acre tract is awarded to an agricultural claimant and he causes the segregation thereof from the mineral portion as aforesaid, such agricultural portion will not be given a numerical designation as in the case of surveyed mineral claims, but will simply be described as the "Fractional ——— quarter of the ——— quarter of section ———, in township ———, of range ———, meridian, containing ——— acres, the same being exclusive of the land adjudged to be mineral in said forty-acre tract."

106. The surveyor must correctly compute the area of such agricultural portion, which computation will be verified by the surveyor-general.

107. After the authenticated plat and field-notes of the survey have been received from the surveyor-general, this office will issue the necessary order for the entry of the land, and in issuing the receiver's receipt

and register's patent certificate you will invariably be governed by the description of the land given in the order from this office.

108. The fees for taking testimony and reducing the same to writing in these cases will have to be defrayed by the parties in interest. Where such testimony is taken before any other officer than the register and receiver, the register and receiver will be entitled to no fees.

109. If, upon a review of the testimony at this office, a ten-acre tract should be found to be properly mineral in character, that fact will be no bar to the execution of the settler's legal right to the remaining *non-mineral* portion of his claim, if contiguous.

110. No fear need be entertained that miners will be permitted to make entries of tracts ostensibly as mining-claims, which are not mineral, simply for the purpose of obtaining possession and defrauding settlers out of their valuable agricultural improvements; it being almost an impossibility for such a fraud to be consummated under the laws and regulations applicable to obtaining patents for mining-claims.

111. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days' publication of notice, and posting of diagrams and notices, as a preliminary step; and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less than five hundred dollars thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost where a survey is required, after which he can enter and pay for the land embraced by his claim.

112. Blank forms for proofs in mineral cases are not furnished by the General Land Office.

N. C. McFARLAND, *Commissioner.*

DEPARTMENT OF THE INTERIOR, *October* 31, 1881.

Approved.

S. J. KIRKWOOD, *Secretary.*

### *b.* DEFINITION OF "ROCK IN PLACE" AND "VALUABLE MINERAL DEPOSITS."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *July* 15, 1873.

GENTLEMEN; I have had under consideration a number of letters, mostly from California, wherein inquires are made as to the proper course to pursue to obtain title to public lands containing valuable deposits of borax, carbonate and nitrate of soda, sulphur, alum, and asphalt. Among them is one from the Nevada Consolidated Borax Company, from which it appears that this company intends to commence the utilization of the alkaline plains of Nevada.

The first section of the act of Congress approved May 10, 1872, reads as follows: "That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to

be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," etc.

The second section declares "that mining-claims upon veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located," etc.

The sixth section refers to "a patent for any land claimed and located for valuable deposits."

It will be observed that in the first section of the act the expression "valuable mineral deposits" is employed, while in the second and sixth sections the language is "valuable deposits." Allowing, however, that it was the intention of the law-makers by this act to dispose of "valuable mineral deposits," the question becomes this, "What is a valuable mineral deposit?"

The meaning of the word valuable need not be discussed. Anything a person is willing to give money for, or that is useful or precious, or that has merchantable qualities, is valuable. The word deposit has always been construed by this office to be a general term, embracing veins, lodes, ledges, placers, and all other forms in which valuable metals have ever been discovered.

In the sense in which the term mineral was used by Congress, it seems difficult to find a definition that will embrace what mineralogists agree should be included. The several authorities consulted in this connection seem to find it an easier task to determine what is not, than what is, mineral. However, in all the works on mineralogy that have come under my notice, borax, nitrate and carbonate of soda, sulphur, alum, and asphalt, are classified and discussed as minerals.

Alger's edition of Phillips' Mineralogy speaks of "the crust of the globe as consisting chiefly of earths and earthy minerals." Between earths and minerals there is a clear line of demarkation, and, though difficult to express in a few words, chemical composition and crystallization are the principal means of tracing the distinction. Webster seems to be the most accurate in his definition of a mineral, for he recognizes chemical composition as the important consideration. He defines a mineral to be "any inorganic species having a definite chemical composition."

From a careful examination of this matter, the conclusion I reach as to what constitutes "a valuable mineral deposit" is this:

That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.

The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that Congress intended it as a general mining law, "to promote the development of the mining resources of the United States," and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except where a special law might intervene, reserving from sale, or regulating the disposal, of particularly specified mineral-bearing lands.

To the several inquiries in the letters referred to, I therefore reply that lands valuable on account of borax, carbonate of soda, nitrate of soda, sulphur, alum, and asphalt, as well as "all valuable mineral deposits," may be applied for and patented under the provisions of the mining act of May 10, 1872. In case an application should be presented to you for a survey of land valuable for other minerals than those specified herein and in the act itself, you will first refer the question to this office, in order that applicants may be saved the expense of applying for lands that may be reserved by a special act of Congress.

It will be observed that the mineral-producing lands are divided into two classes—the one class embraces lands where the mineral matter is within "rock in place," or, geologically speaking, "*in situ*;" and the second includes placers and all forms of deposits excepting those in "rock in place." In this connection I deem it a matter of importance to give the construction this office places upon the expression, "vein or lode of quartz or other rock in place," to prevent mistakes in locating the two classes of mines referred to, thereby saving to claimants considerable expense and delay.

In geology and among miners, veins or lodes imply generally an aggregation of mineral matter found in the fissures of the rocks which inclose it, but are of great variety, veins differing very much in their formation and appearance. Lode is a term in general use among the tin miners of Cornwall, and was introduced on the Pacific coast by emigrants from the Cornish mines, and signifies a fissure filled either by metallic or earthy matter. In several of the mining districts, the terms lead and ledge are employed in the local regulations concerning mines. Lead is used to convey the same idea as lode, while ledge would seem to indicate a layer or stratum of mineral interposed between a course or ridge of rocks.

Veins may be either sedimentary, plutonic, or segregated, or of infiltration, or attrition, depending upon the peculiar formation, or the mode of occurrence of the mineral deposit. There is also another form of deposit different from either of those mentioned above, called contact deposit.

European miners mention still others, called in England "floors," in Germany "Stockwerke," and a form of deposit known as "Fahlband." These latter are, more properly speaking, ore-bearing belts, irregular in their dimensions, but presenting a certain degree of parallelism with each other. Similar in some respects to the Fahlbands, are the metalliferous zones, or "amygdaloidal bands," which are said to exist on Mount Lincoln and Mount Bross, Colorado.

However, if the question were raised, neither of the forms of deposit known as contact deposit, Fahlbands, or segregated veins, could be accepted as true metalliferous veins, nor could it frequently be made to appear, without expensive excavation, whether the metal in the mine for which a patent is sought occurs in the form of a true vein or not.

But there is no reason for supposing that the terms were employed in their strict geological signification. The plain object of the law is to dispose of the mineral lands of the United States for money value, and whatever form of deposit can be embraced in the general phrase "vein or lode of quartz, or other rock in place," must be sold at the rate of five dollars per acre.

It is evidently the policy of the Government to include as much land as possible under this designation, for the reason that, as the most valuable metals and minerals occur in the several vein-formations, it is desirable that the lands wherein they are discovered should be sold in limited quantities, thereby preventing the few from monopolizing large tracts, which ought to remain open to all for exploration and development; and for the further reason that the Government derives a larger revenue from the sale of lands of this description.

In fine, I include in the first class all lands wherein the mineral matter is contained in veins or ledges, occupying the original habitat or location of the metal or mineral; whether in true or false veins, in zones, in pockets, or in the several other forms in which minerals are found in the original rock, whether the gangue, or matrix, is disintegrated at the surface or not.

You will please give publicity to this communication where it can be done without expense to the Government.

WILLIS DRUMMOND, *Commissioner.*

*To Surveyors-General and Registers and Receivers.*

### *a.* HEARING TO DETERMINE CHARACTER OF LAND.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 20, 1872.

GENTLEMEN: In order to save as much as possible the expense, trouble, and delay incident to the present manner of taking proofs as to the mineral or agricultural character of lands, it is hereby directed that testimony upon this point may be taken before a clerk of a court of record in and for the county in which the land is situate, after due notice, in the following manner, to wit:

Hereafter, when an application is filed to enter land as agricultural which is alleged, under oath, to be mineral in character, or which is returned upon the official township plat as mineral, or land which is now or may hereafter be suspended by order of this office for proof as to the non-mineral character thereof, you will, upon such application being made, require such applicant to publish, at his own expense, a notice thereof once each week, for four consecutive weeks, in a newspaper of largest circulation published nearest to the land in question; such notice to give the name and address of the claimant, the designation of the subdivision embraced by his filing, the names of any miners, or mining companies whose claims or improvements are upon the land, or in the immediate vicinity thereof, the names of the parties who filed the affidavits that the land is mineral; and, finally, the notice should name a day, which shall not be less than thirty (30) days from the date of the first insertion of said notice in such newspaper, upon which testimony will be taken before the county clerk, to determine the facts as to the mineral or non-mineral character of the land, when such persons as may be brought by the parties in interest will be examined and their testimony reduced to writing; the whole to be duly attested by the seal of the court, and transmitted to the register and the receiver, who will thereupon examine and forward the same to this office, with their joint opinion as to the character of the land, as shown by the testimony. A copy of this notice must be posted in a conspicuous place, upon each forty-

acre subdivision claimed, for four consecutive weeks, proof of which must be made under oath by at least two persons, who will state when the notice was posted and where posted.

At the hearing, there must be filed the affidavit of the publisher of the paper that the said notice was published for the required time, stating when and for how long such publication was made, a printed copy thereof to be attached and made a part of the affidavit. In every case where practicable, in addition to the foregoing, personal notice must be served on the mineral affiants, and upon any parties who may be mining upon or claiming the land.

At the hearing, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer-mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular forty-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular forty-acre subdivisions such crops are raised; also which of these subdivisions embraces his improvements, giving in detail the extent and value of his improvements, such as house, barn, vineyard, orchard, fencing, etc.

It is thought that *bona fide* settlers upon lands really agricultural, will be able to show, by a clear, logical, and succinct chain of evidence that their claims are founded upon law and justice; while parties who have made little or no permanent agricultural improvements, and who only seek title for speculative purposes, on account of the mineral deposits known to themselves to be contained in the land, will be defeated in their intentions.

The testimony should be as full and complete as possible; and in addition to the leading points indicated above, everything of importance bearing upon the question of the character of the land should be elicited at the hearing. If, upon a review of the testimony at this office, a forty-acre tract should be found to be properly mineral in character, that fact will be no bar to the execution of the settler's legal right to the remaining non-mineral portion of his claim, if contiguous. The fees for taking testimony and reducing the same to writing, in these cases, when taken by a clerk of a court of record, as aforesaid, will have to be defrayed by the parties in interest.

When, by reason of proximity to the local land-office, an applicant to enter lands of this class prefers to have the testimony taken before

the register and the receiver, instead of the clerk of a court of record, as aforesaid, he has that option. In such case the mode of proceeding is fully set forth in the enclosed circular of the sixth May, 1871, which circular is hereby modified, as to the manner of giving notice, so as to conform with these instructions relative to that point. It must be steadily kept in mind that the testimony hereby authorized to be taken before the clerk of a court is not for the purpose of determining questions of conflict between either pre-emption or mineral claimants, but simply to determine the character of the land, whether mineral or agricultural.

When the testimony is taken before the clerk of a court, as aforesaid, the register and the receiver will be entitled to no fees; those paid by the parties to the county clerk being all they are required to pay with reference to the proof as to the character of the land.

No fear need be entertained that miners will be permitted to make entries of tracts ostensibly as mining claims, which are not mineral, simply for the purpose of obtaining possession and defrauding settlers out of their valuable agricultural improvements; it being almost an impossibility for such a fraud to be consummated under the laws and regulations applicable to obtaining patents for mining claims. The fact that a certain tract of land is decided upon testimony to be mineral in character, is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give three months' publication of notice, and three months' posting of diagrams and notices, as a preliminary step; and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less than one thousand [500] dollars thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost, where a survey is required, after which he can enter and pay for the land embraced by his claim.

It is quite unlikely that a miner would undertake these long and expensive proceedings, simply for the purpose of attempting to defraud an agriculturist out of a tract of land which was not mineral, but improved agricultural land, when there is an almost absolute certainty, not only of his scheme being frustrated, but also of his being unable to furnish the proof always required as a basis of patent for a mineral claim.

You are requested to give the foregoing careful attention, and to furnish copies hereof to parties upon application, in order that they may be fully informed in the premises.

WILLIS DRUMMOND, *Commissioner.*

*Register and Receiver, U. S. Land Office at* ———.

[See General Circular, par. 93 to 111.—EDITOR.]

CIRCULAR OF APRIL 27, 1880.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *April* 27, 1880.

REGISTERS AND RECEIVERS, *U. S. District Land Offices:*

GENTLEMEN: Your attention is directed to the following copy of letter from the Hon. Secretary of the Interior:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 22, 1880.

"SIR: I have received your letter of the 16th instant, calling my attention to the withdrawals heretofore made of mineral lands, under the direction of my predecessor, Hon. C. Delano, and setting forth at length the difficulties which arise in the adjustment of homestead and pre-emption claims on account of said withdrawals, and recommending in view of such difficulties that the 'present policy and practice of throwing the burden of proof upon agricultural claimants be reversed; that the applicant for such entry be required to make the non-mineral affidavit required as aforesaid, and that this be deemed sufficient in absence of the alleged mineral character of his claim; that if a party does allege in proper form that the land is valuable for minerals, he should be required to affirmatively prove the fact, instead of in every case, with or without such allegation, requiring every settler to prove an expensive negative.'

"You further recommend 'that the withdrawals heretofore made as aforesaid be revoked, in order to remove the restriction upon *bona fide* agricultural settlements, and to place such lands in a condition where they can be occupied, purchased, and developed.'

"I have carefully considered the recommendations made by you for the reasons stated, and have to say that they meet my approval.

"You are therefore instructed to so modify the instructions of your office as to conform to said recommendations, and you are also instructed to revoke the orders of withdrawals mentioned by you, in order that the restrictions thereby made upon agricultural settlements of the lands may be removed.

"Very respectfully,

"C. SCHURZ, *Secretary.*

"*The Commissioner of the General Land Office.*"

The recommendations to the Hon. Secretary, upon which his said approval was based, are, in brief and in substance, that immense tracts of land are now, and, for several years last past have been, officially designated as mineral lands; that as a matter of fact but an exceedingly small part of this entire area is valuable for minerals, but is good agricultural land; that these withdrawn lands are subject to entry under the homestead, pre-emption, and other laws providing for the sale of agricultural lands, only after a hearing in every case, wherein the burden of proof lies upon the agricultural applicant to establish that the tract claimed is non-mineral; that it is thus rendered exceedingly easy to cause such applicant great expense, delay, and vexation; that the expense, embarrassment, and delay actually incident to the course hitherto pursued operate to discourage and prevent settlements on such lands; that the timber on these lands is being largely taken on the claim that they are

mineral lands; and that the vast tracts so designated, and which are capable of supporting many thousands of settlers, adding largely to the production of the country, and contributing to its better progress, are not only for the most part practically reserved from sale under any law, but being so secluded it becomes easier for a party to fraudulently enter as agricultural a tract which he may discover to be valuable for minerals than for a *bona fide* settler to secure patent for agricultural land. All of such withdrawals heretofore made of lands in your district are hereby revoked; and when any party applies to enter any tract under any of the laws relating to agricultural lands, he will be required to make the usual non-mineral affidavit, which, in the absence of any allegation that the land is mineral, will be deemed sufficient. Should affidavits be filed with you, properly alleging any tract sought to be entered as aforesaid to be mineral, you will, after due notice, hold a hearing to determine the facts. In such cases the burden of proof will rest upon the party who alleges the land to be valuable for minerals, and he must affirmatively prove his allegations.

It is expected that you will exercise all possible prudence and care in respect to this matter, and endeavor to carefully and conscientiously maintain and advance the purpose of the Department and this Office, to wit: to enable the public lands, which are in fact agricultural, to be occupied and purchased without oppressive conditions, and to prevent lands which are in fact valuable for minerals from being taken except under the special laws applicable thereto.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

CIRCULAR OF DEC. 17, 1880.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *Dec.* 17, 1880.

REGISTERS AND RECEIVERS, *U. S. District Land Offices:*

GENTLEMEN: In every case where it becomes necessary under the law and existing instructions of this office to require a hearing to be held and testimony taken for the purpose of ascertaining the mineral or agricultural character of land, you are directed to cause such hearing to be held before a duly qualified officer whose office is located nearest the land in dispute, the distance to be computed by ordinary routes of travel. Whenever the local land-office comes within this rule, the hearing will be held before the register and receiver.

It is intended to cause these hearings to be held, so far as practicable, in such manner as to afford the least inconvenience to persons interested. Should it appear, therefore, by written stipulation of all the parties, that this purpose will best be subserved by the designation of any particular officer authorized to administer oaths within the land-district in which the land in controversy is situated, the instructions herein may be departed from in accordance with such stipulation. It may also happen that the officer who would otherwise be selected is an interested party, or some other good reason may appear why his designation would be improper, and in such case you will direct the hearing to be held before the next nearest officer.

These instructions are in accordance with section 2335 United States

Revised Statutes, and the rule suggested by the Hon. Secretary of the Interior, February 16, 1878.

J. A. WILLIAMSON, *Commissioner.*

CIRCULAR OF SEPTEMBER 23, 1880.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *September* 23, 1880.

REGISTERS AND RECEIVERS, *United States District Land Offices:*

GENTLEMEN: Hereafter in case of application being made in your office to enter or select, as agricultural land under any act of Congress other than the pre-emption or homestead acts, lands returned as mineral by the surveyor-general, you will require the applicant, at date of final proof, location, or selection, to publish for thirty days a notice describing the land applied for, and giving time and place when such proof will be submitted or selection tendered. You will also post in your office a copy of the notice for the same period. Proof of publication will consist of the affidavit of the publisher of the newspaper in which the notice was published, and you will furnish your own certificate as to posting in your office.

The revocation of withdrawals of lands as mineral by circular of April 27, 1880, was made not only because said withdrawals had, in many instances, worked great hardships to settlers, but because it is required by law that homestead and pre-emption claimants shall publish notices of their intention to make final proof on their entries, and this was thought to afford sufficient protection to all parties; but in case of entries under other laws there is no such notice required. This procedure will apply to cases of application to enter under the townsite, desert land, and timber culture laws; applications to select lands under grants to States, railroad, and wagon-road companies; and the locations of the various classes of scrip upon lands which have been returned by the surveyor-general as mineral in character.

Where, after such publication of notice has been regularly made, no affidavits alleging the mineral character of the land have been filed with you, you will allow the entry, selection, or location upon the filing of a proper non-mineral affidavit. If such mineral affidavits shall have been filed, you will proceed with a hearing as directed by the circular of April 27, 1880.

Acknowledge the receipt hereof.

Very respectfully,

J. A. WILLIAMSON, *Commissioner.*

*d.* SURVEYS.

CIRCULAR OF NOVEMBER 20, 1873.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *Nov.* 20, 1873.

SIR: Information has reached this office that deputies, in surveying mining claims, are in the habit of following the direction of the parties in interest, instead of adhering to the lines established in the original location of such claims, and thus, in effect, making a private instead of an official survey.

Under all laws and regulations, whether local or general, the location

of a claim in such a manner as to give notice to all the world of the nature and extent of the same is not only indispensable, but in most cases, mining claims are initiated thereby, and all subsequent proceedings are based upon and must conform to such location. A failure to make and record the location in accordance with the law and regulations in force at the date of the location will defeat the claim, and if it is not made with such definiteness as to operate as notice to all persons seeking to acquire rights to mining-lands, it will be void for uncertainty.

It follows, therefore, that in making surveys of mining-claims, it becomes essentially necessary to ascertain the boundaries thereof as established by the original location, for the rights of the claimant are limited and defined by such boundaries. To make a survey in accordance with other lines or boundaries, is tantamount to making a new location of the claim, and the rights of adjoining locators who have complied with the requirements of the law may be interfered with and defeated thereby. The practice of making surveys according to the dictation of parties in interest, instead of in accordance with the original location, has already caused great confusion and been productive of great injury to *bona fide* claimants.

You will, therefore, require the applicant for a survey to furnish a copy of the original record of location, properly certified to by the recorder having charge of the records of the mining locations in the district where the claim is situate, and cause all official surveys of mining claims to be made in strict conformity with the lines established by the original location as recorded; and if the record of locations made prior to the passage of the mining act of May 10, 1872, is not sufficiently definite and certain to enable the deputy to make a correct survey therefrom, he should, after reasonable notice in writing to be served personally or through the United States mail on the applicant for survey and adjoining claimants, whose residence or post-office address he may know, or can ascertain by the exercise of reasonable diligence, take the testimony of neighboring claimants, and other persons who are familiar with the boundaries thereof as originally located and asserted by the locators of the claim, and after having ascertained by such testimony the boundaries as originally established, he should make a survey in accordance therewith, and transmit full and correct returns of survey, accompanied by the copy of the record of location, the testimony, and a copy of the notice served on the claimant and adjoining proprietors, certifying thereon, when, in what manner, and on whom, service was made.

The act of Congress of May 10, 1872, expressly provides that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," and "that all records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims, located by reference to some natural object or permanent monument, as will identify the claim."

These provisions of the law must be strictly complied with in each case to entitle the claimant to a survey and patent, and therefore should a claimant under a location made subsequent to the passage of the

mining act of May 10, 1872, who has not complied with said requirements in regard to marking the location upon the ground and recording the same, apply for a survey, you will decline to make it.

The only relief for a party under such circumstances will be to make a new location in conformity to law and regulations, as no case will be approved and patented by this office unless these and all other provisions of law are substantially complied with. If the law has been complied with in the matter of marking the location on the ground and recording the same, and any question arises in the execution of the survey as to the identity of monuments, marks, or boundaries, which cannot be determined by a reference to the record, the deputy should take testimony in the manner hereinbefore prescribed for surveys of claims located prior to May 10, 1872; and having thus ascertained the true and correct boundaries originally established, marked, and recorded, make the survey accordingly.

You will at once issue instructions to your deputies, requiring them to abandon the practice of surveying mining claims under the direction of parties in interest, and to conform to the rule as hereinbefore prescribed. From an examination of the returns of surveys of mining-claims, I am satisfied that in many instances the deputy surveyors certify to the value of improvements without ascertaining whether such improvements are made by the claimant or his grantors, or not. No improvements should be included in the estimate unless they have been made by the applicant for survey or by those from whom he derives title. The value of improvements made upon other locations, or by other claimants, should not be taken into consideration, but excluded by deputies in their estimate of improvements upon the claim.

You will so instruct your deputies, and hereafter require them to certify in each instance that the improvements and expenditures considered by them in their estimate, and which they must describe in their report, were made by the applicant or by the persons from whom he derives title.

The following certificate will be attached to the field-notes of survey by the surveyor-general:

"I certify that the foregoing transcript of the field-notes of the survey of the ——— mining-claim, situate in ——— mining-district, county of ———, and ——— of ———, has been correctly copied from the original notes of said survey on file in this office; that said field-notes furnish such an accurate description of said mining claim as will, if incorporated into a patent, serve fully to identify the premises; and that such reference is made therein to natural objects and permanent monuments as will perpetuate and fix the *locus* thereof.

"I further certify that the value of the labor and improvements upon the said mining claim, placed thereon by the claimant and his grantors, is not less than five hundred dollars, and that said improvements consist of—(here describe the improvements made by the applicant and his grantors upon the claim.) I further certify that the plat thereof filed in the U. S. land-office at ——— is correct and in conformity with the foregoing field-notes.

"———, U. S. Surveyor-General for ———.

"U. S. Surveyor-General's Office, ———, 187—."

The following certificate will be indorsed upon each plat by the surveyor-general, viz:

"The original field-notes of the survey of the ———, from which this plat has been made, have been examined and approved, and are on file in this office, and I hereby certify that they furnish such description of said ——— mining-claim as will, if incorporated into a patent, serve fully to identify the premises; and that such reference is made therein to natural objects and permanent monuments as will perpetuate and fix the *locus* thereof.

"I further certify that the value of the labor and improvements upon the said mining-claim, placed thereon by the applicant and his grantors, is not less than five hundred dollars, and that said improvements consist of—(here describe the improvements made by the applicant or his grantors upon the claim.) And I further certify that this is a correct plat of said ——— mining-claim or premises, made in conformity with said original field-notes of survey thereof.

"——— ———, U. S. Surveyor-General for ———.

"U. S. Surveyor-General's Office, ———, ———, 187—."

You will acknowledge the receipt hereof, and issue the necessary instructions to your deputies to secure a strict compliance with the foregoing instructions.

Very respectfully,

WILLIS DRUMMOND, *Commissioner.*

*U. S. Surveyor-General* ———.

[See General Circular, pars. 28, 29, 30, 31, 37, 38, 43, 49, 53, 55, 59, 62, 71, 72, 73, 82 to 92 inclusive, 102 to 107 inclusive.—EDITOR.]

CIRCULAR OF NOVEMBER 13, 1877.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *November* 13, 1877.

SURVEYOR-GENERAL OF ———:

SIR: Upon the examination of the field-notes of survey of several deputy mineral surveyors, it is found that the proper amount of care and accuracy in the execution of the field-work and in the preparation of the field-notes of survey are not exercised by all who have been appointed as deputy mineral surveyors.

You will observe that section 2334 of the Revised Statutes of the United States authorizes the surveyor-general to appoint to each land-district containing mineral lands as many *competent* surveyors as shall apply for appointment to survey mining-claims. The law only authorizes the appointment of *competent* surveyors, and when in the discharge of your duties you become convinced that a deputy who has received an appointment is *incompetent* or careless in the discharge of his duties, you will promptly revoke his appointment.

You will require *each deputy mineral surveyor* to enter into bonds, with two or more sureties, in the sum of $10,000, for the faithful performance of his duties in the survey of mining claims under the mining statutes.

You will inform your deputies of the import of this letter and acknowledge the receipt thereof.

Very respectfully, your obedient servant,

J. A. WILLIAMSON, *Commissioner.*

CIRCULAR OF SEPTEMBER 13, 1878.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *September* 13, 1878.

To U. S. SURVEYORS-GENERAL:

By direction of the Hon. Secretary of the Interior, under date of 6th inst., you are hereby instructed as follows:

1st. The survey and plat of mineral claims, required by section 2325, Revised Statutes of the United States, to be filed in the proper land-office with application for patent, must be made subsequent to the recording of the location of the mine; and when the original location is made by survey of a United States deputy surveyor, such location survey cannot be substituted for that required by the statute as above indicated.

2d. The surveyor-general should derive his information upon which to base his certificate as to the value of labor expended or improvements made, from his deputy who makes the actual survey and examination upon the premises, and such deputy should specify with particularity and full detail the character and extent of such improvements.

I desire also to call your attention to section 2320, U. S. Revised Statutes, referring to vein or lode claims, which requires that "the end lines of each claim shall be parallel to each other."

It appears that in some instances this explicit statutory requirement has been disregarded. Hereafter you will approve no survey of such claims unless the end lines thereof are parallel to each other.

Promptly instruct your deputy surveyors accordingly.

Very respectfully,
U. J. BAXTER, *Acting Commissioner.*

CIRCULAR OF MARCH 3, 1881.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *March* 3, 1881.

GENTLEMEN: On the 8th ultimo the Honorable Secretary of the Interior established the following rule in regard to the survey of mining-claims, viz: "The mining survey first applied for shall have priority of action in all its stages in the office of the surveyor-general, including the delivery thereof over any other survey of the same ground or any portion thereof;" and authorized this office to prescribe regulations for the proper enforcement thereof.

In the future, therefore, you will be governed by these regulations:

1st. The surveyor-general should not order or authorize a survey of a claim which conflicts with one previously applied for until the survey first applied for has been completed, examined, approved, and platted, and the plats delivered.

2d. When the conflict does not appear until the field-notes of the respective surveys are returned, then the survey first applied for should be first examined, approved, and platted, and the plats delivered before the field-notes of the survey last applied for are taken up for examination or plats constructed.

3d. When the survey first authorized is not returned within a reasonable period, and the applicant for a conflicting survey makes affidavit that he believes (stating the reasons for his belief) that such first appli-

cant has abandoned his purpose of having a survey made, or is deferring it for vexatious purposes, to wit, to postpone the subsequent applicant, the surveyor-general shall give notice of such charges to such first applicant, and call upon him for an explanation under oath of the delay. He shall also require the deputy mineral surveyor to make a full statement in writing, explanatory of the delay; and if the surveyor-general shall conclude that good and sufficient reasons for such delay do not exist, he shall authorize the applicant for the conflicting survey to proceed with the same; otherwise, the order of proceeding shall not be changed. The surveyor-general shall retain on his files all affidavits, &c., relating to the controversy, and in the event of an appeal from his action, shall forward the same to this office.

The deputy surveyors are under your control in the execution of their work, and you will properly instruct them concerning the prompt execution thereof.

4th. Whenever an applicant for a survey shall have reason to suppose that a conflicting claimant will also apply for a survey for patent, he may give a notice in writing to the surveyor-general, particularly describing such conflicting claim, and file a copy of the notice of location of such conflicting claim. In such case the surveyor-general will not order or authorize any survey of such conflicting claim until the survey first applied for has been examined, completed, approved, and platted, and the plats delivered.

It is the intent of the rules adopted as aforesaid to furnish the first applicant in good faith for a survey with the opportunity to first present his application for patent at the district land-office, and thus secure orderly proceedings. When the field-notes and plats have been delivered, however, it is held by the Honorable Secretary that no authority exists to prescribe the order in which application for patent shall be filed, it being then the right of the party to present his application when he chooses.

Therefore you will seek to avoid errors in the matter of delivery of surveys, and in case of conflicting surveys will postpone the delivery of those last applied for for such temporary period as will be sufficient to enable the first applicant to present his application for patent.

When the survey first applied for is executed and delivered in ignorance of a conflict which speedily thereafter shall appear by the return of a subsequent survey, you will notify the prior party of the existence of the conflict. If, however, the first survey shall have been delivered for any considerable period, at the time the conflict is shown, such notice need not be given.

J. A. WILLIAMSON, *Commissioner.*

U. S. SURVEYORS-GENERAL.

CIRCULAR OF SEPTEMBER 24, 1879.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *September* 24, 1879.

TO UNITED STATES SURVEYORS-GENERAL:

GENTLEMEN: You will please instruct all United States deputy mineral surveyors in your respective districts that they are precluded from acting, either directly or indirectly, as attorneys in mineral claims.

You will also forthwith transmit to this office a list of all your deputy mineral surveyors, with the post-office address of each. Advise this office of subsequent appointments as soon as made, and promptly report any violation of this order.

Very respectfully,

J. M. ARMSTRONG, *Acting Commissioner.*

Approved: A. BELL, *Acting Secretary.*

CIRCULAR OF JANUARY 20, 1879.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *January* 20, 1879.

REGISTER AND RECEIVERS, *U. S. Land Offices:*

Hereafter, when a mineral entry is made in your office, you will promptly report the fact, with proper description, to the surveyor-general of your district.

You will likewise report cancellations of mineral entries.

Respectfully,

J. A. WILLIAMSON, *Commissioner.*

*e.* ANNUAL EXPENDITURE.

CIRCULAR INSTRUCTIONS OF MARCH 18, 1873, JUNE 9, 1874, AND MARCH 5, 1875.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March* 18, 1873.

The following is an act of Congress approved March 1, 1873, (see Part I, No. 6:)

By this legislation the requirements of the fifth section of the act of May 10, 1872, are changed by extending the time for the first annual expenditure upon claims located prior to May 10, 1872, to June 10, 1874.

The requirements in regard to expenditures upon claims located since May 10, 1872, are in no way changed.

W. W. CURTIS, *Acting Commissioner.*

[A similar circular dated June 9, 1874, was issued under the act of June 6, 1874.—EDITOR.]

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *March* 5, 1875.

The following is an act of Congress approved February 11, 1875:

[See part I., No. 8.]

By this legislation the requirements of section 2324 Revised Statutes [5th section of the Mining Act of May 10, 1872,] in regard to the expenditure upon mining claims, are so modified that money which has been or may be expended in running a tunnel for the purpose of developing one or more lodes owned by such persons or company, shall be considered as expended upon such lodes.

The expenditures required upon mining claims may be made from the surface, or in running a tunnel for the development of such claims.

S. S. BURDETT, *Commissioner.*

CIRCULAR OF JANUARY 17, 1881.

ACT OF JANUARY 22, 1880.

The first section of this act has reference only to the affidavits mentioned in section 2325 of the Revised Statutes. It is, therefore, held that it has no reference to the manner of establishing proof of citizenship. An applicant for mining patent who resides in the land district in which the mine is located, if within the district at the time the application is made, must make the required affidavits. If he is not so within the district, the affidavits may be made by a duly appointed agent conversant with the facts.

It is held, under the second section of the act that labor performed or money expended upon a mining-claim prior to the 1st day of January succeeding the date of location thereof will not be considered as a part of or applied upon the first annual expenditure required by law. Thus, upon a claim located at any time during the year 1880, the *period* within which the labor must be performed commences January 1, 1881, and *during* the calendar year 1881 the expenditure must be made, or the claim will be subject to relocation on and after January 1, 1882.

In order to apply the law to a claim located prior to the year 1880, it will be necessary to calculate from the date of location. For instance, upon a claim located in 1875, the first expenditures would be reckoned as due within one year from January 1, 1876, to wit: January 1, 1877, and *annually* thereafter by the *calendar year*.

J. A. WILLIAMSON, *Commissioner*.

[See Part I, No. 10.]

*f*. STONE AND TIMBER LANDS.

The first, second, and third sections of the act of Congress of June 3, 1878, [Part I, No. 14,] Circular Instructions, dated August 13, 1878, provide, for the sale of surveyed lands in California, Oregon, Nevada, and in Washington Territory not yet proclaimed and offered at public sale, valuable chiefly for timber and stone, unfit for cultivation, and consequently for disposal under the pre-emption and homestead laws. When a party applies to purchase a tract thereunder, the register and receiver will require him to make affidavit that he is a citizen of the United States by birth or naturalization, or that he has declared his intention to become a citizen under the naturalization laws. If native-born, parol evidence of that fact will be received; if not native-born, record evidence of the prescribed qualification must be furnished. In connection therewith, he will be required to make the sworn statement in duplicate, according to the attached form, as provided for in the second section of the act. One of the duplicate statements filed in each is by the act required to be transmitted to this office, and the registers and receivers will accordingly send up with their monthly returns the duplicate statements to be transmitted for the month.

The evidence in regard to the publication of notice required to be furnished, in the third section of the act, must consist of the affidavit of the publisher or other person having charge of the newspaper in which the notice is published, with a copy of the notice attached thereto, setting forth the nature of his connection with the paper, and that the notice was duly published for the prescribed period. The evidence re-

quired in the same section with regard to the non-mineral character of the land, and its unoccupied and unimproved condition, must consist of the testimony of at least two disinterested witnesses, to the effect that they know the facts to which they testify from personal inspection of the land and of each of its smallest legal subdivisions, as per form attached. This testimony may be taken before the register or receiver, or any officer using an official seal and authorized to administer oaths in the land-district in which the land lies. Upon such proof being produced, if no adverse claim shall have been filed, the entry applied for may be allowed in pursuance of the provisions of the act. The receiver will issue his receipt for the purchase money, and the register his certificate of purchase, numbering the entry in the regular cash series. The register and receiver will enter the sale on their books and make the usual returns therefor to this office, noting on the monthly abstracts, opposite the entry, and on the entry papers, a reference to the act of Congress under which allowed. They will forward all the papers in the case with their returns to this office, except the retained duplicate statement filed under the second section of the act, to which the register will give the same number with the other papers for the entry, and retain it on the appropriate file with the formal application in his office.

The register and receiver will be entitled to a fee of five dollars each for allowing an entry under said act, and jointly at the rate of twenty-two cents and a half per hundred words for testimony reduced by them to writing for claimants, which will be accounted for as other fees.

If, at the expiration of the sixty days' notice provided for in the third section of the act, an adverse claim should be found to exist calling for an investigation, the register and receiver will allow the parties a hearing according to the rules of practice.

In case of an association of persons making application for such an entry, each of the persons must prove the requisite qualifications, and their names must appear in and be subscribed to the sworn statement, as in case of an individual person. They must also unite in the regular application for entry, which will be made in their joint names as in other cases of joint cash entry. The forms prescribed for cases of applications by individual persons may be adapted for use in applications of this class.

SWORN STATEMENT UNDER TIMBER AND STONE ACT OF JUNE 3, 1878.

LAND OFFICE AT———,
(*Date*) ———, 18—.

I, ——— ———, of —— county ——, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory," for the purchase of the —— of section ——, township ——, of range ——, do solemnly —— that I* ——; that the said land is unfit for cultivation, and valuable chiefly for its ——; that it is uninhabited; that it contains no mining or other improvements ——, nor, as I verily believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said act; that I do not apply to purchase the land above discribed on speculation, but in good faith to appropriate it to my own exclusive use and benefit; and that I have not, directly or indirectly, made any

*In case the party has been naturalized, or has declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished.

agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title which I may acquire from the Government of the United States may inure in whole or in part to the benefit of any person except myself.

——— ———.

Sworn to and subscribed before me this —— day of ——, 18—.

——— ———,

———.

(The testimony of two witnesses, in this form, taken separately, required in each case.)

TESTIMONY OF WITNESS UNDER TIMBER AND STONE ACT OF JUNE 3, 1878.

——— ———, being called as a witness in support of the application of ——— ——— to purchase the —— of section ——, township ——, of range ——, testifies as follows:

Ques. 1. What is your post-office address, and where do you reside?

Ans. ———.

Ques. 2. What is your occupation?

Ans. ———.

Ques. 3. Are you acquainted with the land above described by personal inspection of each of its smallest legal subdivisions?

Ans. ———.

Ques. 4. When and in what manner was such inspection made?

Ans. ———.

Ques. 5. Is it occupied; or are there any improvements on it not made for ditch or canal purposes, or which were not made by, or do not belong to, the said applicant?

Ans. ———.

Ques. 6. Is it fit for cultivation?

Ans. ———.

Ques. 7. What causes render it unfit for cultivation?

Ans. ———.

Ques. 8. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so state what they are, and whether the springs or mineral deposits are valuable.

Ans. ———.

Ques. 9. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. ———.

Ques. 10. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. ———.

Ques. 11. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the Government of the United States may inure, in whole or in part, to the benefit of any person except himself?

Ans. ———.

Ques. 12. Are you in any way interested in this application, or in the lands above described, or the timber or stone, salines, mines, or improvements of any description whatever thereon?

Ans. ———.

——— ———,

I HEREBY CERTIFY that witness is a person of respectability; that each question and answer in the foregoing testimony was read to —— before —— signed —— name thereto, and that the same was subscribed and sworn to before me this ——day of ——, 18—.

——— ———,

———.

NOTE.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the Government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law.

TITLE LXX.—CRIMES.—CH. 4.

SEC. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states and subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years, and shall, moreover, thereafter, be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. [See Sec. 1750.]

## *g.* SALINE LANDS.

CIRCULAR OF APRIL 10, 1877.

The act of Congress of January 12, 1877, [Part I., No. 15,] provides a mode of proceeding by which public lands indicated by the field-notes of survey, or otherwise, to be *saline in character* may be rendered subject to disposal.

Should *prima facie* evidence that certain tracts are saline in character be filed with the register and receiver of the proper land-district, they will designate a time for a hearing at their office, and give notice to all parties in interest in order that they may have ample opportunity to be present with their witnesses.

At the hearing the witneses will be thoroughly examined with regard to the true character of the land, and whether the same contains any known mines of gold, silver, cinnabar, lead, tin, copper, or other valuable mineral deposits, or any deposits of coal.

The witnesses will also be examined in regard to the extent of the saline deposits, upon the given tracts, and whether the same are claimed by any person; if so, the names of the claimants, and the extent of their improvements must be shown.

The testimony should also show the agricultural capacities of the land, what kind of crops, if any, have been raised thereon, and the value thereof. The testimony should be as full and complete as possible, and in addition to the leading points indicated above, everything of importance bearing upon the question of the character of the land should be elicited at the hearing.

The register and receiver will transmit the testimony to this office with their joint opinion thereon. When the case comes before this office, such a decision will be rendered in regard to the character of the land as the law and the facts may warrant.

Should the given tracts be adjudged agricultural, they will be subject to disposal as such. Should the tracts be adjudged *saline lands*, the register and receiver will be instructed to offer the same for sale, after public notice, at the local land-office of the district in which the same shall be situated, and to sell said tract or tracts to the highest bidder for cash, at a price of not less than $1.25 per acre.

In case said lands fail to sell when so offered, the same will be subject to private sale at such land-office for cash, at a price not less than $1.25 per acre, in the same manner as other public lands are sold.

The provisions of this act do not apply to any lands within the Territories, nor to any within the States of Mississippi, Louisiana, Florida,

California, and Nevada, none of which have had a grant of salines by act of Congress.

J. A. WILLIAMSON, *Commissioner.*

*To Registers and Receivers.*

*h.* COAL LANDS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, WASHINGTON, D. C., *April* 15, 1880.

GENTLEMEN; The act of Congress approved March 3, 1873, entitled "An act to provide for the sale of the lands of the United States containing coal," is as follows, to wit: [See Part I, No. 1, Revised Statutes, Sections 2347 to 2352 inclusive.]

Your attention is called to the following points:

1. The sale of coal lands is provided for—
   1. By ordinary private entry under section 1.
   2. By granting a preference right of purchase based on priority of possession and improvement under section 2.

2. The land entered under either section must be *by legal subdivisions*, as made by the regular United States survey. Entry is confined to surveyed lands; to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

3. Individuals and associations may purchase. If an individual, he must be twenty-one years of age and a citizen of the United States, or have declared his intention to become such citizen.

4. If any association of persons, each must be qualified as above.

5. A person is not disqualified by the ownership of any quantity of other land, nor by having removed from his own land in the same State or Territory.

6. Any individual may enter by legal subdivisions as aforesaid any area not exceeding one hundred and sixty acres.

7. Any association may enter not to exceed three hundred and twenty acres.

8. Any association of not less than four persons, duly qualified, who shall have expended not less than $5,000 in working and improving any coal mine or mines, may enter under section 2 not exceeding six hundred and forty acres, including such mining improvements.

9. The price per acre is $10 where the land is situated *more* than fifteen miles from any completed railroad, and $20 per acre where the land is *within* fifteen miles of such road.

10. Where the land lies *partly within* fifteen miles of such road and in *part outside* such limit, the *maximum* price must be paid for all legal subdivisions, the greater part of which lies within fifteen miles of such road.

11. The term "completed railroad" is held to mean one which is actually constructed on the face of the earth; and lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at $20 per acre.

12. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and im-

prove, or shall open and improve, any coal mine or mines, and which they shall have in actual possession.

13. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly-defined possession must be established.

14. The *opening and improving* of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

15. These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue his development of the mines, in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under section 2 by adverse claimants, as the circumstances of each case may justify.

16. In conflicting claims, where improvement has been made *prior to March* 3, 1873, you will, if each party make subsequent compliance with the law, award the land *by legal subdivisions*, so as to secure to each as far as possible his valuable improvements; there being no provision in the act allowing a joint entry by parties claiming separate portions of the same legal subdivision.

17. In conflicts, when improvements, etc., have been commenced subsequent to March 3, 1873, or shall be hereafter commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

18. After an entry has been allowed to one party, you will make no investigation concerning it at the instance of any person except on instructions from this office. You will, however, receive all affidavits concerning such case and forward the same to this office, accompanied by a statement of the facts as shown by your records.

19. Prior to entry, it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest and substantiated by the affidavits of disinterested and credible witnesses.

20. Notice of contest, in every case where the same is practicable, must be made by reading it to the party to be cited, and by leaving a copy with him. This notice must proceed from your office and be signed by the register or receiver. Where such personal service cannot be made by reason of the absence of the party, and because his whereabouts are unknown, a copy may be left at his residence, or, if this is unknown, by posting a copy in a conspicuous place on the tract in controversy, and by publication in a weekly newspaper having the largest general circulation in the vicinity of the land (where no newspaper shall be specified by this office) for five consecutive insertions, covering a period of four weeks next prior to the trial; and in each case requiring such notice a copy must be forwarded with the returns

to this office, accompanied with proof of service by affidavit indorsed thereon.

21. In every case of contest, all papers in the same must be forwarded to this office for review before an entry is allowed to either party.

22. Thirty days from your decision will be allowed by you to enable any party to take an appeal, or file argument to be forwarded to this office.

23. No appeal will be entertained unless the same shall be forwarded through the district land-office.

24. The party may still further appeal from the decision of the Commissioner of the General Land Office to the Secretary of the Interior. The appeal must be taken within sixty days after service of notice on the party. This may be filed with the district land-officers and by them forwarded, or it may be filed with the Commissioner, and must recite the points of exception.

25. If not appealed, the decision is by law made final. (See section 10, act of June 12, 1858, United States Statutes, volume 11, page 326.) After appeal, thirty days are usually allowed for filing arguments and the case is then sent to the Secretary, whose decision is final and conclusive.

26. Manner of obtaining title: First, by private entry. The party will present the following application to the register, and will make oath to the same:

I, ——— ———, hereby apply, under the provisions of the act approved March 3, 1873, entitled "An act to provide for the sale of the lands of the United States containing coal," to purchase the ——— quarter of section ———, in township ———of range ———, in the district of lands subject to sale at the land-office at ———, and containing ——— acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States, (or have declared my intention to become a citizen of the United States,) and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. So help me God.

——— ———.

To this affidavit the register will append the usual jurat.

27. Thereupon the register, if the tract is vacant, will so certify to the receiver, stating the price, and the applicant must then pay the amount of purchase-money.

28. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the General Land Office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate receipt such patent will be delivered, at the option of the patentee, either by the Commissioner at Washington or by the register at the district land-office.

29. This disposition at private entry will be subject to any valid prior

adverse right which may have attached to the same land, and which is protected by section 2.

30. Second. When the application to purchase is based on a priority of possession, etc., as provided for in section 2, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, etc., must be allowed.

31. The declaratory statement must be substantially as follows, to wit:

I, ——— ———, being ——— years of age, and a citizen of the United States, (or having declared my intention to become a citizen of the United States,) and never having, either as an individual or as a member of an association, held or purchased any coal-lands under the act approved March 3, 1873, entitled "An act to provide for the sale of the lands of the United States, containing coal," do hereby declare my intention to purchase, under the provisions of said act, the ——— quarter of section ———, in township ——— of range ———, of lands subject to sale at the district land-office at ———; and that I came into possession of said tract on the ——— day of ———, A. D. 18—, and have ever since remained in actual possession continuously, and have expended in labor and improvements on said mine the sum of ——— dollars, the labor and improvements being as follows: (here describe the nature and character of the improvements;) and I do furthermore solemnly swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. ——— ———.

32. When the township plat is not on file at date of claimant's first possession, the declaratory statement must be filed within sixty days from the filing of such plat in your office.

33. When improvements shall have been made prior to June 4, 1873, the declaratory statement must be filed within sixty days from that date.

34. No sale under this act will be allowed by you prior to September 4, 1873. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment, but you will allow no party to make final proof and payment, except on notice as aforesaid to all others who appear on your records as claimants to the same tracts.

35. A party who otherwise complies with the law may enter *after* the expiration of said year, *provided* no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the Government cannot thereafter protect him against another who complies with the law, and the value of his improvements can have no weight in his favor.

36. One person can have the benefit of one entry or filing *only*. He is disqualified by having made such entry or filing, alone or as a member of an association. No entry can be allowed an association which has in it a single person thus disqualified, as the law prohibits the entry or holding of more than one claim either by an individual or an association. You are to allow no entry, under this act, of lands containing other valuable minerals. You will determine the character of the land under the present rules relative to agricultural and mineral lands.

Those that are sufficiently valuable for other minerals to prevent their entry as agricultural lands cannot be entered under this act.

37. Assignments of the right to purchase under this act will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which dates from the first day of the possession of the assignor who initiated the claim.

38. You will so construe this act in its application as not to destroy or impair any rights which may have attached prior to March 3, 1873. Those persons who may have initiated a valid claim under any prior law relative to coal-lands will be permitted to complete their entries under the same.

39. You will report at the close of each month as "sales of coal-lands" all filings and entries under this act in separate abstracts, commencing with number *one*, and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal-lands you will continue the same without change. The affidavit required from each claimant at the time of actual purchase will be as follows, to wit:

I, ——— ———, claiming the right of purchase under the act of Congress entitled "An act to provide for the sale of the lands of the United States containing coal," approved March 3, 1873, to the ——— quarter of section ———, in township ——— of range ———, subject to sale at ———, do solemnly swear that I have never had the right of purchase under this act, either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of ——— dollars, the nature of such improvements being as follows: ——— ——— ———; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable mineral deposit other than coal. So help me God.

——— ———.

I, ——— ———, of the land-office at ———, do hereby certify that the above affidavit was sworn and subscribed to before me this ——— day of ———, A. D. 18—.

——— ———.

40. In case the purchaser shows by an affidavit that he is not personally acquainted with the character of the land, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent, it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

J. A. WILLIAMSON, *Commissioner.*

*To Registers and Receivers.*

[For instructions under the coal acts of 1864 and 1865, see COPP'S PUBLIC LAND LAWS, pp. 661, 664.]

# PART III.

# LAND OFFICE RULINGS.

## *a.* UNDER THE GENERAL MINING LAWS.

### AFFIDAVITS AND WITNESSES.

**There is no compulsory process to secure the attendance of witnesses before the local officers. Parties serve their own subpœnas and may be witnesses in their own behalf. *Ex-parte* affidavits may be received in applications for patents.**

*Commissioner Joseph S. Wilson to Register and Receiver, Helena, Montana, August* 15, 1868.

The law provides no compulsory process to secure the attendance of witnesses before registers and receivers, neither as to proceedings under the mining, the pre-emption, nor the homestead acts, no instance being remembered of any particular difficulty arising from this want of power. Parties serve their own subpœnas, and it can seldom happen that a *bona fide* claimant will experience any trouble in obtaining the necessary testimony.

*Ex-parte* affidavits may be received generally in applications under the mining act; reasonable care being required on the part of the register and receiver not to suffer themselves to be imposed upon by pretended affidavits or reckless or dishonest witnesses.

The officers before whom the affidavit is made should usually be able to certify to the credibility of the witness; yet where such is not the case, and the deponent is a stranger to you, it will be proper for you to require his character for truth to be established to your satisfaction before giving credit to his affidavit, in all cases where the question deposed to is not merely technical, but goes to the merits of the claim.

The law requires that you should be satisfied of the truth of the testimony offered in whatever form it may be presented; and, in arriving at this result, you are not to be cramped by any technical rules, but are left to the exercise of sound judgment, and an honest, upright purpose to perform your duties faithfully.

Congress has prescribed the policy of not excluding any witness in the courts of the United States on account of being a party to, or interested in, the issue tried. The same rule should be observed in proceedings before the Executive Department, and you are instructed to be governed by that principle.

The weight of the evidence is of course still a matter for your judgment, as in all other cases where a witness may be supposed to be laboring under a bias, or to have a stronger motive to incline to one side more than the other, in his testimony.

HOW LAND PATENTS ARE ASSIGNED.

*Commissioner Wilson to G. W. Warren, Boston, Mass., Jan.* 21, 1869.

There are no regulations or rules governing the assignment of patents issued by the General Land Office. Such patents are deeds, conveying to the grantees the title to certain land previously existing in the United States; and if these parties desire to transfer to others the title thus acquired, they must of course conform to the laws of the *locus rei sitæ* [State or Territory] relating to the conveyance of realty.

DECISIONS OF COURTS.

*Commissioner Wilson to Hon. A. A. Sargent, Washington, D. C., January* 26, 1869.

* * * It may be true that the Inimitable Company lost its case in the California court, through its attorneys; but if so, the injury is one this office has no power to correct. It can neither supervise nor disregard the decisions rendered by such courts in cases of conflicting claims to the possession of mining property under the local customs, and until the Inimitable Company can procure a reversal of the judgment in the above case, no patent can be issued to it for the premises in controversy.

SULPHUR SPRINGS.

*Commissioner Wilson to Register and Receiver, Fair Play, Colorado, August* 25, 1869.

The testimony shows that no mines of gold, silver, cinnabar, or copper, exist upon this land, but that a sulphur spring is situated thereon. This office does not regard sulphur springs as saline or mineral, so as to come within the inhibition of the statutes excluding mineral and saline lands from pre-emption entry or scrip location.

PATENT.

Proceedings when duplicate receiver's receipt cannot be found.

*Commissioner Wilson to Register and Receiver, Central City, Colorado, April* 18, 1870.

You state that you have received a letter from G. F. Ladd, Esq., secretary of the Cascade Silver Mining Company, to the effect that duplicate receipt for mineral entry No. 11, Cascade lode, has been lost, and after careful and diligent search cannot be found, and desiring to be informed how he can obtain the patent.

The patent may be transmitted to Mr. Ladd, upon a compliance with the following conditions, viz:

1st. That he furnish you with satisfactory proof, under the corporate seal of the company, that he is the duly elected secretary thereof, and authorized to receive the patent for their claim; and

2d. His affidavit setting forth that he was in possession of said duplicate receipt, No. 11, for the Cascade lode; that the same has been lost; and that, up to the present time, after careful and diligent search, he is unable to find it.

This affidavit must be taken before an officer duly qualified to administer oaths, and attested by his seal; and upon filing the same, with the evidence before recited, the patent may be sent to him, requesting an acknowledgment of its receipt.

SCHOOL SECTIONS.

**Sections sixteen and thirty-six, embracing mineral lands, are not granted to the State of Nevada.**

*Commissioner Wilson to Register and Receiver, Carson City, Nevada, May* 24, 1870.

As to the right of the State of Nevada to sections sixteen and thirty-six as school lands, when the same are known to contain valuable minerals, I have to state that the question was submitted to the Secretary of the Interior with the views of this office thereon; the concurring opinion of the head of the Department on the subject being shown in the inclosed copy of his letter.

The State register will be allowed to select other lands as indemnity when school sections Nos. sixteen and thirty-six are found to be mineral.

INCLOSURE.

In the inclosed letter, dated May 20, 1870, Secretary J. D. Cox said:

The seventh section of the enabling act of 21st March, 1864, passed at the first session of the 38th Congress, grants to said State said sections, unless sold or otherwise disposed of by any act of Congress.

Joint resolution of the 30th January, 1865, (13 Stat., 567,) declares: "That no act passed at the first session of the 38th Congress, granting lands to States or corporations, to aid in the construction of roads, or *for other purposes*, or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be, and are, reserved exclusively to the United States, unless otherwise specially provided in the act, or acts, making the grant."

This joint resolution prescribes a rule of construction which, applied to the act, would exclude from its operation mineral lands. Such lands are reserved exclusively to the United States, unless "otherwise specially provided" in the act making the grant.

PURCHASE-MONEY.

*Commissioner Wilson to Register and Receiver, Fair Play, Colorado, September* 14, 1870.

There is no provision of law, or regulation of this office, by which the money paid for a mining-claim may be refunded, when a decision is made reducing the extent of a claim, except for so much of the superficies as is not included in the reserves necessary to cause the claim to conform to the local laws and customs of the miners.

When a decision is rendered, by which a claim erroneously entered is reduced in size, the purchase-money will be returned, to the extent necessary to make the payment meet the requirement of the law, to wit: five dollars per acre or fractional part of an acre, for the area actually embraced by the survey made, in accordance with such decision.

SAN AGUSTIN MINE.

**Locations in New Mexico, in cases of newly-discovered and abandoned mines.**

*Commissioner Wilson to Register and Receiver, Sante Fe, New Mexico, September* 22, 1870.

This office has examined the papers in the case of the San Agustin

Mining Company's application for a patent for a certain tract of mineral land in township 22 south, of range 3 east, in Doña Aña county, New Mexico, the said tract being claimed by these applicants, under the name of the "San Agustin Mine."

But even if there had been no opposition to the claim, it is not perceived how a patent could issue to the company for the number of feet applied for, to wit: 3,000 feet along the course of the lode, for the following reasons, viz:

On the 18th of January, 1865, the legislature of the Territory of New Mexico passed "an act concerning mining-claims," which, among other things, provides as follows: "That every discoverer of a lode, ledge, or vein of gold-bearing quartz, or of a lode, crevice, or deposit of silver, cinnabar, copper, lead, coal, or any other ore, or the same mixed with other metals or ores, shall have the privilege of locating and holding as against all persons and powers, except the United States, six hundred feet of the length of such lode, ledge, vein, deposit, or crevice," etc.

The act provides also, that other persons may each locate three hundred feet of the length of such lode, ledge, vein, deposit, or crevice, etc., and after specifying the manner in which such locations are to be perfected and recorded, prescribes the policy to be observed with regard to abandoned mines, or those "upon which mining has not been prosecuted regularly for a period of ten years or more."

Such mines are declared, by the seventh section of the act, "vacant and abandoned," and liable to the operation of this act, as fully in all respects, as if they had never been occupied or denounced, and he or they, who shall re-occupy such vacant and abandoned mines, shall be entitled to all the rights and privileges of original discoverers, as provided in this act. Companies of two or more persons, incorporated or otherwise, shall have the same rights and privileges under this act, as single or natural persons, and locate and hold, in manner aforesaid, one mining-claim of three hundred feet for each member of the company, and one discovery-claim: *Provided*, No company shall locate more than four claims, including one discovery-claim, or one thousand five hundred feet in all, upon any one vein or mine: *Provided further*, A company may acquire by purchase but four mining-claims, and this under the same conditions that bound the vendors."

From this it will be seen, that while the territorial law regulating mining-claims in New Mexico fixes the maximum of a company location at 1,500 feet, being only half the maximum prescribed by the Congressional enactment, it fixes the extent of individual locations at 300 feet, or 100 feet in excess of the Congressional limit.

In dealing therefore with claims in New Mexico, located between the dates of January 18th, 1865, and July 26, 1866, the said territorial law will be recognized in all respects; but with regard to locations made subsequent to July 26, 1866, it is ruled:

1. That no individual location can exceed 200 linear feet along the course of the vein or lode, except in the case of the discoverer, who is entitled to an additional claim of 200 feet.

2. That no company location can exceed 1,500 linear feet along the course of the vein or lode, and such location cannot in any case be made

at a rate exceeding 200 feet to each member of the company, (except one of them is the discoverer, to whom 200 feet additional are allowed,) and to allow a company to locate (since the passage of said act of Congress) such quantity as would exceed 200 feet to each member, other than the discoverer, would be illegal and void.

This restriction to 1,500 feet is applicable only to company locations, and is not held to affect their right to purchase the possessory titles to as many adjoining claims upon the same lode, as may be authorized by said territorial law, which limits such right to purchase to four claims, and as a "claim," since the date of the passage of said act of Congress, cannot *exceed* 200 linear feet of a vein or lode, a company having made an original location of 1,500 feet, as above specified, cannot by purchase obtain a right to more than 800 additional feet on the same lode, or 2,300 feet in the aggregate, being 1,500 feet by virtue of location and discovery, and 800 feet by purchase of adjoining locators.

In regard to locations made prior to the passage of the territorial law aforesaid, the land officers will require proof that the claim is in accordance with the local customs or regulations of the miners of the district in which such claim is situated. In the case under consideration, a copy of the laws and regulations, adopted October 10th, 1869, by the miners of "Organ Mountain Mining District," is introduced as a part of the evidence, but as they are not shown to have had any authority to enact regulations not in accordance with the existing law of the Territory, they can receive no consideration by this office.

In acting upon claims hereafter you will be governed by this decision.

### PLACER PATENTS.

**Several placer tracts, not contiguous, but in the same neighborhood, may be embraced in one application for patent.**

*Commissioner Wilson to Hon. A. A. Sargent, Washington, November* 19, 1870.

Where several placer-claims have been surveyed by the United States for an individual or company holding the possessory right thereto under the local laws, there is nothing to prevent the patenting of the several tracts or parcels of mineral ground thus surveyed as a single entry, and the local land officers will be instructed accordingly.

With regard to the matter of newspaper publication in such cases, one notice may include a description of all the tracts or parcels desired to be entered by an individual or company holding the same as aforesaid. But such notice must give a sufficiently accurate description of each parcel or tract applied for as will enable other parties in the neighborhood to tell readily what mineral grounds are sought to be patented.

In these cases it is not deemed proper to make any departure from our regulations, requiring diagram and notice to be posted on the claim for ninety days as required by law; it being considered essential that a diagram of each parcel, together with a copy of the notice of intention to apply for a patent therefor, should be posted thereon for ninety days. The notice, to be posted for a like period in the register's office, may consist of a copy of that published in the newspaper as aforesaid.

The foregoing, it is not intended, should be understood as authoriz-

ing the joint entry of parcels or claims situated at wide distances from each other in different land or mining-districts, but simply to enable individuals or companies holding several placer-claims in the same neighborhood, though not contiguous, to effect their entries, and have their rights adjudicated with as little expense as possible.

LEASE OF MINERAL LANDS.

*Commissioner Wilson to E. J. Mapes, Marquette, Mich., Dec.* 8, 1870.

There is no authority of law under which public lands may be leased by the Government for mining purposes.

PERSONAL NOTICE NOT REQUIRED.

*Secretary Columbus Delano to Commissioner Willis Drummond, February* 24, 1871.

The only objection made by Potter rests upon the alleged fact that he had no knowledge of the application of Reed and Sanders, until the tenth day of October.

Congress has only required that the diagram of the vein or lode of quartz, or other rock in place, should be filed in the local office, and posted in a conspicuous place on the claim, together with notice of an intention to apply for a patent. The register shall publish such notice, and post the same in his office in the mode and for a period prescribed by the act, It was for that body to determine how a party claiming adversely, should be notified of the pending application. If their requirements have been strictly observed, the want of actual personal notice to a person whose alleged rights may be injuriously affected, affords no just ground for staying the proceedings. Such a person is bound, at least so far as the Department is concerned, if the required notice has been duly given. It is, therefore, entirely immaterial whether, in this case, said Potter did or did not know of the application, until a month after the approval of the survey.

PLACERS ON UNSURVEYED LAND.

*Commissioner Drummond to Register and Receiver, Sacramento, California, March* 22, 1871.

With the register's letter were received copies of the papers filed in the application of John C. Bower *et al.*, for patent for what is known as the "Powell" placer-claim, and with reference to the inquiries I would reply that, if (as stated) the township plat had not been filed in your office at the date of this application, you should have considered the claim as upon unsurveyed land, and dealt with it accordingly.

EASEMENTS AND DRAINAGE.

*Commissioner Drummond to Register and Receiver, Helena, Montana, April* 16, 1871.

They (the adverse claimants) claim none of the mining-ground included in said application for patent, but simply that they have a right to construct a drain ditch and bed-rock flume through or across it, to connect with their dumping-ground, as aforesaid; and no suspension of proceedings will be ordered in consideration of the foregoing objections.

However, lest there exist any misapprehension upon the subject, it is

thought proper to state, and you will be particular to so inform all the parties in interest, that in every patent issued by this office for either a lode or placer-claim, a condition, in view of the fifth section of the mining act, is inserted as follows, viz:

"That in absence of necessary legislation by Congress, the legislature of ——— may provide rules for working the mine hereby granted, involving easements, drainage, and other necessary means to its complete development."

It is believed that this condition gives to the legislature of the State or Territory in which a patented claim is situated, ample power and authority for the enactment of all necessary rules and regulations for the proper working and development of the mines, and this as completely in regard to water-ditches and flumes, as in any other respect; and if parties have, by virtue of compliance with local laws, customs, or regulations of miners, or by decisions of courts, acquired the right to construct and maintain ditches or flumes across the mining grounds occupied by others, it is not perceived how their rights in this respect will be impaired by the issuing of a patent, or that, if necessary, the aid of the courts may not be invoked, as well after the issuance of a patent as before it.

TERRIBLE *vs.* GUNBOAT.

**Foreign companies cannot set up an adverse claim to unpatented ground. Claims cannot be located for the Miners' Relief and Territorial Poor Fund, of Colorado. Ground already patented will be excepted from a patent on a subsequent application, crossing the prior patented claim.**

*Commissioner Drummond to Register and Receiver, Central City, Colorado, June* 7, 1871.

GENTLEMEN: With your letter of date the twenty-fourth March last, were received the papers and your report in the matter of an application of William A. Hamill, for a patent for certain mining premises, called the Gunboat lode, situate in Clear Creek county, Colorado Territory.

* * * On the eleventh August, 1870, Robert O. Old, agent and superintendent of the Colorado Terrible Lode Mining Company, filed in your office his sworn statement, protesting against the survey and entry of said premises claimed by Hamill, "for the reason that said premises are not the property of said William A. Hamill, and the said applicant is not entitled to hold the same under and by the local laws of said Griffith mining district, nor the laws of Colorado Territory; and because the same premises, or some portion thereof, are claimed adversely by the Colorado Terrible Lode Mining Company; and said premises as described in said diagram, cannot be entered without interfering with certain property owned by it, and described as follows: The west seven hundred feet of the Terrible lode, to wit: the west half of property for which United States patent issued to Fred. A. Clark and Henry Crow, on the fourth day of December, 1869, and therefore make this adverse claim."

On the nineteenth day of November, 1870, the said claimant, William A. Hamill, relinquished "from said application for patent all claim for patent to said east seven hundred (700) feet of said Gunboat lode, under the above application, hereby expressly declaring my intention not to

relinquish any rights I may have to the east seven hundred feet of said lode, under the provisions of the local laws."

* * * With reference to that portion of the affidavit of the agent of the Colorado Terrible Lode Mining Company, which alleges that the application of Hamill for patent for the westerly seven hundred feet of the Gunboat lode, "commences on, covers, and is identical with a part of the seven hundred feet of the Terrible lode, which was patented to Frederick A. Clark and Henry Crow, and by them deeded to said company," it is proper to state that an examination of the plat of the final survey, showing the relative positions of these claims, fails to substantiate this alleged interference further than to show that post No. 6, at the northeast corner of the Gunboat survey, is a few feet inside the westerly limits of the surface-ground patented with said Terrible lode; but inasmuch as no patent will issue on this survey of the Gunboat, without a special clause excepting from the conveyance any portion of the fourteen hundred feet of the Terrible lode and surface-ground patented therewith, it is not perceived that this portion of said company's objections is entitled to further consideration.

The company's further objection appears to be, in effect, that Hamill's said application and survey covers one hundred feet of mining-ground adjoining and immediately beyond the westerly end line of the said patented Terrible lode.

Their alleged possessory title to this disputed hundred feet of ground appears to have originated in a location thereof, made and recorded on the thirteenth day of December, 1866, as Claim No. 1, West, on the Terrible lode, in the name of the "Miners' Relief and Territorial Poor Fund," which was sold on the twelfth of July, 1869, by the county treasurer to Fred. A. Clark and Henry Crow, who, on the eleventh of April, 1870, conveyed the same to said company.

But on the thirteenth day of December, 1866, the date of this location, the Congressional mining law had been in force some months, and under it there was no authority for such location as this, inasmuch as the "Miners' Relief and Territorial Poor Fund" was neither a person nor an association of persons; was without legal existence, and powerless and incapacitated to "occupy and improve" a claim, or perform those acts of ownership, or possession required of miners, as conditions essential to the holding of claims, or of proceeding to make payment to the government and obtain patent.

This office, therefore, declines to give further consideration to the right of said company to oppose said application, ruling that the said location was void *ab initio*, and that they acquired nothing by their purchase thereof from Clark and Crow as aforesaid, those parties having no interest therein whatever to convey.

It likewise appears from the papers that the said "Colorado Terrible Lode Mining Company" is a corporation created and existing under the laws of England, and is therefore not a citizen of the United States and not capable of asserting a claim to any portion of the public land of the United States, or of receiving from the Government a title therefor in any event.

FRANKLIN LODE.

Liens on mining claims are protected and strengthened by patent.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, June* 19, 1871.

With regard to the question of the lien claimed by the said adverse parties upon a portion of the property, it will be perceived by a reference to the 13th section of the amendatory mining act of 9th July, 1870, (which constitutes a part of the original mining enactments,) that a proviso is contained therein, "That nothing in this act shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent."

If, therefore, as alleged, the parties opposing this application have such lien upon the premises, or any portion thereof, they are fully protected by the law of Congress itself, and after the patent shall have been issued to the applicants, thus quieting the title, the parties claiming such lien will be in a much better condition to enforce it than if the question of titles was undermined.

ROCK IN PLACE DEFINED.

*Commissioner Drummond to Hon. Thomas Boles, Dardanelle, Arkansas, July* 20, 1871.

The term "rock in place," as used in the mining acts of Congress, has always received the most liberal construction that the language will admit of, and every class of claims that, either according to scientific accuracy or popular usage, can be classed and applied for as a "vein or lode," may be patented under this law.

The plain object of the law is to dispose of the mineral lands of the United States for money value; and it is a matter of indifference to the Government whether the metal occurs in the form of a true or false vein.

It may be observed, as an important point, that no proof is required to establish the vein formation of the deposit. The law requires the surveyor-general to certify "to the character of the vein exposed;" but this is understood to mean that the certificate should show whether the vein exposed contains gold, silver, cinnabar, or copper.

DISTRICT LAWS, IN THE ABSENCE OF STATE OR TERRITORIAL STATUTES, GOVERN EXTENT OF LOCATIONS.

*Commissioner Drummond to E. J. Masters, Columbia, Cal., August* 25, 1871.

The acts of Congress limit the right to apply for and receive patents for mining-claims to those who have occupied and improved their claims in accordance with the local laws, customs, and rules of miners.

In the absence of any State or Territorial enactment regulating the occupancy and possession of mining-claims, miners may alter or amend the laws of the district; but this action will not affect claims already located, as a claim must conform to the laws in force at the date of its location.

Should the miners deem it advisable to amend their district laws, they

may relocate their claims under and conformably to such amended laws, and upon complying with the acts of Congress and the instructions of this office, may enter and receive patents for the same.

CINNABAR AND COPPER DEPOSITS.

*Commissioner Drummond to J. E. Morgan, Clayton, Cal., August* 26, 1871.

As copper and cinnabar are found in "rock in place," rather than in the form of placers, parties desiring to obtain patents for lands valuable on account of the deposits of cinnabar or copper, must enter the same as lode-claims.

FLAGSTAFF MINE.

*Commissioner Drummond to Register and Receiver, Salt Lake City, Utah, November* 10, 1871.

In view of the existing discrepancy between the premises described in the application for patent and that embraced in the survey, and of the fact that the published notice does not properly describe the *locus* of the claim as the same is set forth in the application and diagram, it is held that there is no authority of law for granting a patent upon this claim, in its present condition before this office, but that proceedings under the statute should be commenced *de novo*.

PUBLIC HIGHWAY.

*Commissioner Drummond to Williams & Carpenter, Sacramento, California, December* 29, 1871.

It would appear from Mr. Mulli's affidavit that his whole objection to the granting of a patent on said application, is based upon the fact that 224 feet of a certain public highway is embraced thereby.

As the right of way is fully protected by said eighth section, (act of July 26, 1866,) Mr. Mulli's protest is not such an adverse claim as is contemplated by said sixth section, (act of July 26, 1866,) should a patent be issued upon said application of Mr. Blakely, the right of all parties to the use of said highway will be as secure, under the law, as if the title had remained in the Government.

EXEMPLIFICATIONS OF PATENTS AND PAPERS.

*Commissioner Drummond to John H. Whiting, New York City, January* 2, 1872.

Before the desired exemplification [certified copy of a patent for the Daniel Peters lode] can be furnished, it will be incumbent upon you to show what interest you, or those for whom you are acting, have in the premises in question, in order that this office may be able to determine whether, under the law, the exemplification can properly be furnished.

AURIFEROUS CEMENT CLAIMS.

*Commissioner Drummond to Thomas N. Stoddard, Sonora, California, February* 12, 1872.

If it was intended to ask if the auriferous cement claims, found in what are sometimes called ancient river-beds, and usually worked by the hydraulic process, properly come within the signification of the term "rock

in place," the answer must be in the negative; several claims of that character having already been patented under the placer mining law of July 9th, 1870, they fully coming within the meaning of the term "placer" as defined in said act.

RHODE ISLAND LODE.

The uncontested portion of a mining-claim for which patent is sought may be patented.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, February* 27, 1872.

This office holds, therefore, that the foregoing verdict and judgment are fatal to the application of Bradley *et al.* to the extent of five hundred feet of the premises claimed by them as Rhode Island lode, leaving, however, two hundred and fifty feet of the claim uncontested.

If the claimants have expended an amount equal to one thousand dollars upon this *uncontested part* in labor and improvements, and can in other respects come within the law, there is perceived no reason why they cannot proceed and obtain title to the portion of their original claim not affected by said verdict and judgment, should they desire to do so.

ALGER LODE.

Interested parties alone can assert an adverse claim.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, March* 4, 1872.

Before a survey of the claim was made or approved by the surveyor-general, Joseph M. Marshall filed his sworn statement, to the effect that said application of Tascher embraces and is identical with claim No. 13 east, on the Kansas lode, owned by the Empire State, Texas, and Lincoln Gold Mining Company, of Colorado, in whose behalf he files this sworn statement, "solely that justice may be done in the premises, and the said company protected in their title to said property."

This affiant is not shown to have any interest whatever in the premises, or any authority for appearing in behalf of said company, even if any such exists, a fact not established, however, by the papers.

The sixth section of the mining act provides that, "whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear," &c.

Mr. Marshall having no interest whatever in the mine "located and claimed as aforesaid," and no authority to represent parties having such interest, his affidavit entirely fails as an adverse claim upon which to suspend proceedings under the act, even if he had furnished the abstract of title or proof of possessory right of said company to the Kansas lode, as required by circular instructions.

WATER RIGHTS.

A special clause, protecting water rights, is inserted in patents issued for lands in the mining States and Territories.

*Commissioner Drummond to Hon. A. A. Sargent, Washington, D. C., March* 21, 1872.

I am satisfied that rights to the use of water for mining, manufactur-

ing, agricultural, or other purposes, and rights for the construction of ditches and canals, used in connection with such water rights, are fully protected by law; yet, in order that all misapprehension that might exist between the holder or claimant of such right and such patentee might be set at rest, it was determined, in all patents hereafter granted in mineral regions of the United States, to insert an additional clause or condition, expressly protecting and reserving such water rights, and making the patent subject thereto, the same as before it was granted.

WASHINGTON LODE.

Patent may be delivered to owner of a mine, though he may not be the person named in the application for patent.

*Acting Commissioner W. W. Curtis to Register and Receiver, Central City, Colorado, April 4, 1872.*

Said claim was, on the fifteenth February, 1871, patented to said applicants in their incorporate name, to wit: to the Chicago and Clear Creek Gold and Silver Mining Company, and the patent was transmitted to you for delivery with letter of February 18, 1871.

On the eighteenth ultimo, this office received a letter from the receiver at Central City, Colorado, inclosing a number of papers, and stating that said final survey of the Washington lode was applied for May 11, 1870, and money therefor deposited by Alex. Huyett, a stockholder in said company; that said Huyett exhibited a letter of authority, signed by the secretary of said company, instructing him to complete the application; that the entry was made August 30, 1870, and said Huyett informed that the duplicate receipt was ready for him; that he never called for it, but soon afterward went to Utah Territory, his whereabouts not being known to the receiver.

The receiver further states, that a communication was addressed to Wm. Aldrich, the president of said company, at Chicago, Illinois, but no reply was received, and that he is unable to find any representative of the company.

It appears from the papers now received, that Alfred Rollings, at the September term of the district court for the county of Clear Creek and Territory of Colorado, recovered a judgment against the "Clear Creek Silver Mining Company" for the sum of $318.88 damages and $35.10 costs of suit, upon which judgment a special execution was issued, dated the seventh December, 1870, and directed to the sheriff of said county, who afterward levied upon and sold, under said execution, "the whole of the Washington lode, situated upon the same mountain as the Veto lode, and the discovery-shaft of which is about two hundred yards up the mountain from the discovery-shaft of the said Veto lode and in a northwestern direction from the said Veto shaft, situated in Idaho mining-district, Clear Creek county, Colorado Territory," the said Alfred Rollings being the purchaser of said lode at said sale.

It further appears, that said Rollings afterward assigned one-half of his certificate of purchase, under said execution, to Ebenezer T. Wells, and that on the seventh November, 1871, the sheriff conveyed the said lode by deed to said Rollings and Wells, who now apply to have the undelivered patent recalled and another issued to them for the same property, or that said patent be delivered to them as the rightful owners of the premises thereby conveyed.

In explanation of the misnomer in bringing this action, the said Rollings, under oath, deposes and says:

"That he did not, at the time of commencing his said suit, certainly know the true name of said corporation, but deponent knew that one Alex. Huyett, then of said Territory of Colorado, was a stockholder in the corporation, which was indebted to him, and deponent thereupon caused process in his suit to be served on said Huyett, as according to the statute of the Territory of Colorado in that behalf, he lawfully might."

"Deponent further saith, that the corporation against which this demand and cause of action in his said suit existed, was the same corporation, by whatever name known, which had theretofore been in possession of the Washington lode, in Idaho district, county of Clear Creek and Territory of Colorado, and engaged in working the same, under the management and superintendence of one J. Augustine; that one Alex. Huyett, lately of said county of Clear Creek, the same person upon whom the writ of attachment in deponent's said suit was served, was also a member of said corporation, and at times during the absence of Augustine, had assumed to have charge of said Washington lode and the operations of said company therein, and that deponent's demand and cause of action upon which in his said suit he obtained judgment, was for deponent's work and labor as a miner, done and performed, under the employment of said Augustine, upon and in the said Washington lode. Deponent further says that he hath resided within the said Idaho district, and in the immediate vicinity thereof, during all the time for the past ——— years, and that there is no other lode called the Washington lode, or which is known or claimed by that name, in said Idaho district, save the one upon which deponent worked, and for his work upon which the demand in said suit occurred, and that no other corporation, save the one of which said Augustine was agent and said Huyett a member, and for which deponent worked as aforesaid, ever had possession of any part of said Washington lode, or ever asserted any claim thereto," etc.

The fourth section of the practice act of the Territory of Colorado, (Revised Statutes, p. 501,) provides that "In all suits against any incorporated company, summons shall be served on the president thereof, if he resides in the county, but if he do not reside in the county, or be absent from the county, or cannot be found, then the summons shall be served by leaving a copy thereof with any clerk, secretary, cashier, or agent of said company, within such time and under such regulations as are herein provided for the service of such process in suits against natural persons: *Provided*, That if there shall be no such president, clerk, secretary, cashier, or agent of said company to be found in said county, the summons aforesaid shall be served on some stockholder of said company, and such service shall in such cases be deemed as effectual and valid as if made on any of the officers of said company."

It appears that in the suit brought by Rollings, no officer or agent of the company could be found, and in accordance with said act the writ was served upon a stockholder in said company, the said Huyett.

The said Rollings alleges in his sworn statement "that on or about the —— day of ———, A. D. 1871, deponent and said Wells

went into possession of said Washington lode; he is now in full possession of the said lode, and every part thereof, whereof the said company were at any time possessed, and of the workings and improvements therein and every part of said workings and improvements."

In consideration of the evidence presented, and of the fact that misnomer was not pleaded in abatement by the defendants in said action, who, on the contrary, allowed the case to go by default, it is decided that the said patent should be delivered to the said Rollings and Wells, who, it is quite satisfactorily shown, have the possessory title to the lode, thereby conveyed in view of said sheriff's deed.

You will deliver said patent accordingly.

WHEN A PATENT IS RECALLED.

*Acting Commissioner Curtis to Hon. J. B. Chaffee, House of Representatives, April* 5, 1872.

After a patent has once issued, it is contrary to the fixed policy of the department to recall the same, unless it were shown that an error had been committed in the description of the tract, or a mistake made in the name of the patentee; such not being the case in the present instance, this office is unable to comply with the request of Mr. Wells that a new patent be issued for said Washington lode to Mr. Rollings and himself.

HOW A CONTEST BETWEEN MINERS AND AGRICULTURALISTS MAY BE RE-OPENED.

*Commissioner Drummond to the Register, Sacramento, California, June* 20, 1872.

Dingman's entry was allowed, after a hearing taken subsequent to what appears to be a sufficient notice by publication and posting, and by personal service upon the former mineral affiants, who failed to appear. The case cannot now be re-opened upon the affidavits presented, unless the deponents will furnish this office with satisfactory proofs that they, or any of them, have the possessory right to an actual mining-claim on the land so entered by Dingman, and if they have such claim, they must show in what specific forty-acre subdivision of the land so entered their mining location exists.

By the term, actual mining-claim, is meant a claim located and held in accordance with the local customs or rules of miners in the district. Unless this can be shown, or it be established that fraud was resorted to by said agricultural claimant in giving the notices required by circular instructions in such cases, it is not perceived how the affidavits now received are to affect the land entered by William Dingman, in view of the hearing already had, after due notice given by him, as aforesaid.

SATISFACTORY EVIDENCE THAT A CERTAIN TRACT IS AGRICULTURAL IN CHARACTER.

*Secretary Delano to Commissioner Drummond, July* 10, 1872.

The evidence adduced at the trial shows that there are on the land agricultural improvements to the value of $1,000 or $1,200; that the greater portion is inclosed with fencing, and seven or eight acres of it cultivated in fruits, vines, vegetables, and grain; that the only active mining done on the tract was at the Gagen quartz mine, near the western boundary, and some placer-diggings in the N. W. corner; that the owners of the quartz mine abandoned it, declaring that it was exhausted

and worthless, and the diggings were abandoned for the same reasons; and that there are some quartz veins on adjoining lands that may run into this ¼, but that they are all either exhausted or unprofitable.

All the witnesses testify that, in their opinion, the land is more valuable for agricultural than for mining purposes.

The mineral affiants, though present at the trial, in person and by attorney, offered no testimony in support of their affidavits, but contented themselves with cross-examining the opposing witnesses.

I am of the opinion that the agricultural character of the land is established, and rule accordingly.

MILL-SITE MUST BE ON NON-MINERAL LAND.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, July* 29, 1872

The affidavits referred to do not allege the non-mineral character of said mill-site, but only allege that the same "does not to his knowledge contain any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper."

Before patent can issue for this mill-site, additional proof will be required that there are no "valuable deposits," such as placer or gulch mines, embraced within the exterior boundaries thereof.

DEPUTY MINERAL SURVEYORS.

*Commissioner Drummond to W. M. Seawell, Aurora, Nevada, August* 6, 1872.

A deputy mineral surveyor is not authorized to make surveys of mineral claims outside of the State or district for which he is appointed.

PROOF OF CITIZENSHIP WHERE THE APPLICANT'S FATHER WAS A NATURALIZED CITIZEN.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, August* 13, 1872.

Mr. Schweder makes affidavit that he was born in Germany; that he came to this country at the age of six years, and that he has an honorable discharge from the army.

In case Mr. Schweder's parents became naturalized before he arrived at the age of twenty-one, proof should be made of this point, as in this case he would be regarded a citizen.

The twenty-first section of the act of Congress approved July 17, 1862, (12 Stat., page 597,) provides that any alien who has an honorable discharge from the regular or volunteer army, may become a citizen of the United States upon his petition, without any previous declaration of intention to become a citizen of the United States.

DIAMOND-PRODUCING LANDS MAY BE PATENTED UNDER THE MINING LAWS.

Valuable mineral deposits defined.

*Attorney-General G. H. Williams to Secretary Delano, August* 31, 1872.

I have the honor to acknowledge the receipt of your communication of the twentieth instant, submitting for my official opinion the question whether or not title to public lands producing diamonds can be acquired by individuals or associations under the act of Congress entitled "An

act to promote the development of the mining resources of the United States," approved May 10, 1872.

Section one of said act provides, "That all valuable mineral deposits in the lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States." Section six of said act also provides the mode in which a patent may be obtained for land claimed and located for "valuable deposits." Bainbridge, in his work on the law of mines and minerals, page one, says: "A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of, and incapable of, supporting animal or vegetable life. In this view it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metallic ores."

Webster gives the following as the definition of a diamond: "A mineral and a gem, remarkable for its hardness, as it scratches all other minerals." Diamonds are found under a variety of circumstances, and are generally obtained by mining. They are procured in India and South Africa by digging pits in the earth down to a peculiar stratum called the diamond bed.

In Brazil they are washed out of an agglomerate, composed of rounded white quartz pebbles and a light-colored sand. Diamonds, then, are clearly "valuable mineral deposits," and the provisions of said act are as applicable to lands containing them, as to lands containing gold or other precious metals. Comprehensive words, no doubt, were used to include as well what might afterward be discovered, as what might be overlooked in an enumeration of minerals in the statute. Public lands, for the purposes of sale, are divided into agricultural and mineral lands. The minimum price of the former is $1.25, and of the latter $5.00 per acre; mineral lands, exclusive of their valuable deposits, are generally worth little or nothing. Prior to the act of July 26, 1866, (14 Stats., 257,) it was customary for persons to take those deposits without respect to the rights of the United States. Congress then provided a way in which persons locating lands for mining purposes might acquire title, and other acts have since been passed promotive of the same end. I think these acts ought to be most liberally construed, so as to facilitate the sale of such lands; for in that way, and not otherwise, can they be made to contribute something to the revenues of the government, and controversy and litigation in mining localities, to a great extent, prevented.

*Acting Secretary Smith to Commissioner Drummond, September* 3, 1872.

I concur in the views therein set forth, and they will guide your official action in cases of this character.

TUNNEL RIGHTS.

*Commissioner Drummond to Hon. J. B. Chaffee, Denver, Colorado, September* 20, 1872.

The line of the tunnel is held to be the width thereof and no more, and that upon this line only is prospecting for blind lodes prohibited while the tunnel is in progress, and that the right is granted to the tunnel-owners to fifteen hundred feet of each blind lode, not previously known to exist, which may be discovered in such tunnel, but that other parties are in no way debarred from prospecting for blind lodes or running tunnels so long as they keep without the line of the tunnel as herein defined, the said line being required by our regulations to be marked on the surface by stakes or monuments placed along the same from the face or point of commencement to the terminus of the tunnel-line aforesaid.

When a lode is struck or discovered for the first time by running a tunnel, the tunnel-owners have the option of recording their claim of 1,500 feet all on one side of the point of discovery or intersection, or partly upon one and partly upon the other side thereof; but in no case can they record a claim so as to absorb the actual or constructive possession of other parties on a lode which had been discovered and claimed outside the line of the tunnel before the discovery thereof in the tunnel.

ONE PERSON MAY SECURE PATENTS TO SEVERAL MINING CLAIMS.

*Commissioner Drummond to J. G. Irwin, Weaverville, Trinity Co., California, September* 21, 1872.

The mining statute does not restrict a party to one patent, but gives the right to proceed to procure government title to as many valid mining-claims as he may have the possessory right to under local laws, and upon which the necessary amount has been expended in labor or improvements.

MILL-SITE.

If located after the tract enured to a railroad, mill-sites belong to the railroad company.

*Commissioner Drummond to O. R. Leonard, Unionville, Nevada, Oct.* 11, 1872.

In relation to the Golconda mine and mill-site, the latter situated in section 7, T. 35 N., R. 45 E., M. D. M., claimed by the Central Pacific Railroad Company, in virtue of their grant, I have to state that the records of this office show that the rights of said railroad company to said section of land took effect on the eighteenth day of December, 1866; that being the date upon which the route of said road was definitely located, subsequent to which time no adverse right thereto could attach where the land is not mineral in character.

PROCEEDINGS WHERE A MINING-CLAIM IS NOT WITHIN THE LIMITS OF AN ORGANIZED DISTRICT.

*Acting Commissioner Curtis to D. W. Lichtenthaler, Le Grand, Oregon, Nov.* 12, 1872.

In the event of a mining-claim being situated outside of any regularly-

constituted mining-district, affidavit of the fact should be made and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to the location, occupation, and possession of such claim; and any deeds, certificates of location, or purchase, or other evidence, which may be in the claimant's possession and tend to establish his claim.

WYOMING MINE.

Proceedings to cancel patent.

*Commissioner Drummond to Secretary Delano, Dec.* 7, 1872.

I have the honor to state, that on the twentieth day of March, 1872, Alexander Majors, Allen Fowler, and R. C. Chambers filed with the register and receiver, at Salt Lake City, Utah, an application for patent for 1,000 linear feet of the Wyoming mine, situate in American Fork mining district, Utah.

On the thirtieth day of September, 1872, patent issued for said claim as applied for, no objection, protest, or adverse claim being on file in this office.

On the seventeenth day of October, 1872, the register at Salt Lake City forwarded a protest and adverse claim of the Miller Mining and Smelting Company to said application for patent, which protest and adverse claim was filed with said register before the ninety days' publication required by law had expired, and should have been forwarded to this office, with the other papers in the case, before entry was allowed.

Upon the receipt at this office of said adverse claim, the register and receiver at Salt Lake City were directed to demand the return of said patent, the same having been delivered to said Fowler, Majors, and Chambers in the meantime, which demand they refused to comply with.

In view of the fact that a patent has inadvertently and unlawfully issued to said applicants, which they refuse to return, I have the honor to suggest that the matter may be brought to the attention of the Attorney-General, with a request that the adverse claimants, to wit: the Miller Mining and Smelting Company, be permitted to prosecute a suit in the name of the United States, to secure the cancellation of said patent.

*Attorney-General Williams to Acting Secretary Cowen, January* 14, 1873.

I have the honor to acknowledge the receipt of your letter of the eleventh ultimo, inclosing a copy of one from the Commissioner of the General Land Office, in relation to the improper issue of a patent for certain mineral lands in Utah Territory; and in compliance with your request, I have given such instructions as were necessary to the U. S. attorney for Utah to have said patent set aside.

AMENDMENT OF ADVERSE CLAIMS.

*Commissioner Drummond to A. J. Ridge, Grass Valley, California, Jan.* 14, 1873.

When an adverse claim has been filed, the same cannot be amended,

so as to embrace a larger portion of the premises applied for than that described in the original adverse claim.

HORRID *vs.* OLD MISSOURI.

Where all but one of several co-tenants withdraw an adverse claim, the courts must decide the controversy.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, Feb.* 12, 1873.

On the nineteenth April, 1872, Wm. H. Pier filed an adverse claim to said application for patent, alleging in his sworn statement that the premises described in said application for patent embrace and include the Horrid lode, owned in equal and undivided interest by J. P. Arey, James A. Varnes, Philip Paul and myself, "by right of discovery, location and purchase;" that no discovery was made and that no work was done by the said William A. Hamill upon said premises, as described in said diagram of said so-called Old Missouri lode, until after the said Horrid lode was discovered, its discovery-shaft sunk to a depth of eleven feet, and recorded in accordance with the laws of said mining-district and of Colorado Territory;" that the open cut claimed as the discovery of said Old Missouri lode is upon the Horrid lode, and was excavated by one of said adverse claimants.

Wm. H. Pier filed proof of citizenship and an abstract of title from the office of the county clerk and recorder of Clear Creek county, Colorado, by which it appears that seven persons located fourteen hundred feet of the Horrid lode, and made record thereof on the sixth May, 1869, and that the record title to said premises is now in Wm. H. Pier, Philip Paul, James A. Varnes and J. P. Arey.

On the sixth December, 1872, the attorneys for the applicant for patent filed with their argument several inclosures.

One of these inclosures is signed "Philip Paul," and after reciting the circumstances attending the filing of the adverse claim, concludes as follows, viz: "I, the said Philip Paul, do hereby withdraw the said adverse claim so filed, and declare it to be my intention not to any longer contest the right of the aforesaid Wm. A. Hamill to a United States patent to his said claim," etc.

A similar withdrawal, signed "James A. Varnes, by John Fillins, attorney in fact," is also on file.

Pier, having made out a *prima facie* adverse showing to said application, cannot be denied his right and privilege, under the mining acts of Congress, of having his adverse right adjudicated in a court of competent jurisdiction, by reason of two of his co-tenants having declared their "intention not to any longer contest the right of the aforesaid William A. Hamill to a United States patent to his said claim."

You will therefore inform all parties in interest that thirty days from the date of your notification will be allowed the said Wm. H. Pier *et al.* to institute proceedings in a court of competent jurisdiction to determine the right of possession to the premises in dispute.

DIVIDED AND UNDIVIDED INTERESTS.

*Commissioner Drummond to William Singer, Marysville, California, February* 18, 1873.

Where several parties own undivided interests in a mining-claim, it is

necessary that all the owners should join in an application for patent. Where several parties own separate and distinct portions of a claim, application for patent may be made by either of said parties for that portion of the claim owned by him if he desires.

CHOLLAR POTOSI AND BULLION *vs.* JULIA.

When the surface-rights of two claims do not conflict, the possibility of the future union of the two lodes embraced therein should not delay the sale of the land included in the respective claims, nor suspend an application for patent indefinitely to await developments.

Adjoining land is sold subject to the right of the first locator or patentee to follow his vein or lode thereunder, and the second claimant may be enjoined from taking the ore or minerals from such vein or lode.

*Secretary Delano to Commissioner Drummond, February* 24, 1873.

I have considered your decision, rendered May 27, 1872, in the matter of the application of the Julia Gold and Silver Mining Company for patents for the Julia, Scheel, La Cata, Southeast Extension of the Hale and Norcross, and the Sarah Ann lodes, in Nevada.

The facts are as follows:

On the thirtieth September, 1871, applications for patents for these claims were filed in the register's office, at Carson City, Nevada, and notice was given in the usual manner, for ninety days. On the twentieth of December, 1871, and before said ninety days had expired, Mr. Isaac L. Requa, in behalf of the Chollar Potosi Mining Company, filed, in behalf of said company, a protest against issuing patents for said claims, on the ground that, on the fourth of February, 1870, a patent had been issued to said Chollar Potosi Mining Company for their claim on the Comstock lode; that they are still the owners of the property described in said patent; that said lodes, for which the Julia Gold and Silver Mining Company has made application for patents, are the same which underlie the ground embraced in the patent issued to this Chollar Potosi Mining Company; and that underlying the land claimed by the Julia company, there exists no other vein, lode, or lodes, than such as are embraced in the patent to the Chollar Potosi company. Wherefore, the Chollar Potosi company pray that all proceedings may be stayed until the rights of the respective parties shall have been adjudicated in the proper local courts.

There is no claim on the part of the Chollar Potosi company, that their surface-rights conflict with the surface-claims of the Julia company. The patent to the Chollar Potosi company is for fourteen hundred (1,400) linear feet of the Comstock lode, the premises granted being bounded on the east and the west by the walls of the Comstock lode, not yet definitely ascertained, containing $34\frac{74}{100}$ acres, more or less.

It appears that the Julia lode was located May 25, 1863; the Scheel lode, February 28, 1866; the La Cata lode, March 9, 1866; the Southeast Extension of the Hale and Norcross lode, October 22, 1866; and the Sarah Ann lode, March 18, 1868, in accordance with the local rules and customs of miners; and the record title to the whole of the property thus located is now in the Julia company.

It also appears that no legal proceedings have been instituted against the Julia company, calling in question its right to patents. It further appears that the Julia company has in all respects complied with the

mining laws, and all the rules and regulations made in accordance therewith, which are necessary to be complied with before asking for patents for the several claims.

The question thus raised is, whether the protest entered by the Chollar Potosi company against the issuance of patents to the Julia company, and the reasons assigned by the Chollar Potosi company for such protest, constitute "an adverse claim" within the meaning and spirit of the third and sixth sections of the act approved July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes." (14 Stat. 251.)

In order to understand and correctly decide this question, it will be necessary to consider the various provisions of said act, and thus to arrive at its true construction and the legal intent of its authors.

The first section of the act enacts that "the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs and rules of miners in the several mining-districts, so far as the same may not be in conflict with the laws of the United States."

The second section provides that when any person claims a vein or lode of quartz, etc., having occupied and improved the same according to the local customs where the same is situated, and having expended thereon, in actual labor and improvements, an amount not less than a thousand dollars, ($1,000,) and "in regard to whose possession there is no controversy or opposing claim," such claimant may file in the local land-office a diagram, and enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, although it may enter the land adjoining, "which land adjoining shall be sold subject to this condition."

The third section makes provision for a notice of the intention of the applicant to apply for a patent, and directs the register of the land-office in regard to the manner of publishing the notice for such claim; and provides that, after the expiration of ninety days from such publication, if no "adverse claim" shall have been filed, the surveyor-general shall survey the premises and make a plat thereof, indorsed with his approval; and then declares that upon the payment to the proper officer of five dollars ($5) per acre, together with the cost of such survey, plat, and notice, and the giving of satisfactory evidence that the diagram and notice have been posted on the claim during the period of ninety days, the register of the land-office shall transmit to the General Land Office such plat, survey, and description, and a patent shall issue for the same.

The sixth section provides that whenever "an adverse claimant" to any mine, located as aforesaid, shall appear before the approval of the survey, as provided in the third section, proceedings shall be stayed until final settlement and adjudication in the courts, of the "rights of possession to such claim," when a patent may issue, as in other cases.

It will be observed that the second section, after pointing out what is to be done by any person or association claiming a vein or lode of

quartz, before a patent is issued to such person therefor, describes it as one "in regard to whose possession there is no controversy or opposing claim." It also provides that when the patent is issued granting such mine, the right to follow the vein or lode, with its "dips, angles, and variations to any depth, although it may enter the land adjoining," is distinctly recognized. Then it is enacted that the "land adjoining shall be sold subject to this condition." The sixth section then provides that when an "adverse claimant" to any mine shall appear, all proceedings shall be stayed until the courts shall determine "the right of possession to such claim."

In this case, the Chollar Potosi company assert no right of possession to the premises for which the Julia company ask patents. In regard to the surface possession of the property sought to be patented by the Julia company, there is no "controversy" nor "opposing claim." It is asserted, however, that the Comstock lode, previously patented to the Chollar Potosi company, underlies the surface of the several claims for which the Julia company ask patents; and it is also asserted that there is no lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, beneath the surface of the several claims of the Julia company, except it be the Comstock lode, embraced in their patent before referred to. Is this such an "adverse claim" to the "possession" or "right of possession" of the Julia company as is referred to in the third and sixth sections of the act? Does this raise a "controversy" or "opposing claim" in regard to the "possession" of the property for which the Julia company is seeking patents? If so, how is the adjoining land to be sold subject to the rights of the Chollar Potosi company? If, by merely asserting that the lode patented to this company is the only lode underlying the land claimed by the Julia company, they can prevent the issuance of a patent to the Julia company until the question is settled as to whether their assertion is correct or erroneous, how can such "adjoining land" ever be sold "subject to the rights" of the Chollar Potosi company?

The chief purpose of this mining law is to open all the mineral lands of the country to "exploration and occupation," and thus to encourage and stimulate mining operations. Hence the fourth section of the act limits the quantity of surface which any individual may take, to two hundred feet in length, and provides that no person shall make more than one location on the same lode, and that not more than three thousand feet shall be taken in any one claim by any association.

It seems to have been foreseen by the authors of this law that, without some unmistakable expression authorizing "land adjoining" to be sold, difficulties such as this case presents might arise; and to prevent this, and keep open and free to "exploration and occupation" all the mineral lands of the nation, it was enacted that land should be disposed of in very limited quantities, and that lands "adjoining" those first located should remain open to exploration and sale, subject to such rights as might have vested in the first locator. Considering this act in all its parts, keeping each of its provisions in view and observing the relations of one to the other, it seems clear to my mind that in establishing this system for the sale of the mineral lands, it was intended to allow the first patentee to follow his vein, though it may lead him under "adjoin-

ing lands." It seems equally clear that it was also intended that such "adjoining land" should be sold subject only to this right; and it seems equally clear that their right to follow a vein under adjoining land does not create a "controversy" or "opposing claim" under the second section, nor an adverse claim under the third section, to the possession of him who enters the adjoining land for mining purposes.

There is, in this case, no controversy about the "possession" of the surface of the several claims for lodes made by the Julia company, and hence I conclude that the Chollar company has made no such "adverse claim" to the property sought to be patented by the Julia company, as is necessary, by the act aforesaid, in order to require proceedings to be stayed until "final settlement in the courts of the rights of possession to such claim" be had. To allow any other construction would enable the first patentee greatly to obstruct the sale of the mineral lands; for, if a previous patentee sees fit to claim that his vein or lode underlies adjoining land, he can prevent this land from being patented to an indefinite extent of surface, until the fact is ascertained by legal proceedings whether such claim is true or false. He may thus suspend the sale of "adjoining land," and, indeed, prevent any sale "subject to his rights," because he will require these rights to be determined before the adjoining land is patented.

By issuing a patent to the Julia company, the legal rights of the Chollar Potosi company cannot be impaired, because the patent itself, following the direction of the statute, will provide that the adjoining lands are sold subject to the rights of the Chollar Potosi company. That company, if satisfied that its vein or lode is the only one underlying the surface claimed by the Julia company, can enjoin, in a court of equity, the Julia company from proceeding to take minerals previously patented to the Chollar company, and, upon making good their allegations, will at once obtain a perpetual prohibition of the Julia company from proceeding to take such minerals.

This construction of the act will enable the government to proceed to sell "adjoining land," "subject to the rights" of previous patentees, and will prevent the first patentee from prohibiting the government the exercise of this privilege, when adjoining lands are found which are supposed to contain other lodes or veins of minerals than such as have been previously patented. I cannot eradicate from my mind the necessity of this construction. Any other view of it seems to me unreasonable, and against the spirit of the entire act, with a strong tendency, at least, toward an adherence to the letter, rather than to follow the reason, of the law. I therefore affirm your decision, and direct that patents be issued to the Julia company for its several claims, which, on their face, shall show that they are issued subject to the legal rights of all previous locators or patentees.

I am the better satisfied with this conclusion, because I understand that it conforms to the uniform practice and rulings of your office, since the passage of what is termed the mining act.

CALIFORNIA *vs.* DARDANELLES.

**Adverse claim was rejected because not sworn to within the U. S. land district where the mine is located.**

*Commissioner Drummond to Register and Receiver, Carson City, Nevada, March* 7, 1873.

Upon examination of the papers transmitted with your letter of the 24th January last, I find that on the 22d of October, 1872, the Dardanelles Mining Company filed in your office an application for patent for twelve hundred linear feet of the Bosphorous lode, with surface-ground four hundred feet in width, situated in Gold Hill mining district, Storey county, Nevada.

On the 20th day of December, and before the expiration of the sixty days' publication required by law, the California Silver Mining Company, by its president, A. K. P. Harmon, filed a protest against the issuance of patent for the premises described in said application.

This protest was sworn to by Mr. Harmon, before "P. O. Wegener, notary public and commissioner of deeds, for the State of Nevada, in the city and county of San Francisco, California."

The seventh section of the mining act of May 10, 1872, requires "That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same," etc. And the thirteenth section of the same act declares that "All affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land-district where the claim may be situated," etc.

By the foregoing it will be seen that the law requires that an adverse claim should be sworn to before some officer authorized to administer oaths within the land-district where the claims may be situated.

In the case under consideration, the provision of the law was disregarded, and the papers constituting the adverse claim were sworn to, not in the Carson City land-district, but in the city of San Francisco, California.

It seems to be the letter and the spirit of the law to bring parties who desire to assert an adverse claim to an application for patent under the act of May 10, 1872, within the jurisdiction of the courts where the claim is situated.

The adverse claim of the California Silver Mining Company is rejected.

PATENT MAY ISSUE TO ASSIGNEE OF APPLICANT.

*Commissioner Drummond to Gen. Lloyd Aspinwall, New York City, March* 8, 1873.

Patents for mining-claims are issued to the parties named in the register's certificate of entry.

If the applicants for patents for the mines referred to, sold to you the premises described in their applications, after they had commenced proceedings to obtain patents, but before the entry was made at the local office, the register's certificate and the receiver's receipt should have been made out in your name.

Upon your filing a deed from said applicants to you, in this office, the

register and receiver will be instructed to have their certificates and receipts made out in your name.

If, however, you became the purchaser since the date of entry, an indorsement should be made upon the duplicate receipts by the applicants for patent, assigning all their right and title in and to the premises described therein to you, in which event the patent would issue in your name.

CLAUSE INSERTED IN PATENTS ISSUED FOR CLAIMS ON OR NEAR THE COMSTOCK LODE, NEVADA.

*Commissioner Drummond to Adolph Sutro, Washington, D. C., March* 8, 1873.

The register and receiver at Carson City, Nevada, were instructed, on the twenty-ninth July, 1870, of the construction which has been given the act of Congress approved July 25, 1866, "granting to A. Sutro the right of way and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada."

The instructions contained in said letter, of which you have been furnished a copy, are still in force.

In issuing patents for the Comstock lode, or those in the immediate vicinity thereof, the following clause is inserted, viz:

"That the claim hereby granted and conveyed shall be subject to the condition specified in the third section of the act of Congress approved July 25, 1866," granting the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada, "and the grantee herein shall contribute and pay to the owners of the tunnel, constructed pursuant to said act, for drainage or other benefits derived from said tunnel or its branches, the same rate of charges as have been or may hereafter be named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode at the time of the passage of said act, as provided in said third section."

By reference to the inclosed circular, you will perceive that both the acts of July 9, 1870, and May 10, 1872, contain clauses guarding the rights of the owners of the Sutro tunnel.

The land which is embraced by the location of the tunnel has been withdrawn from sale, in accordance with said letter from this office of July 29, 1870.

PAPERS FILED IN THE LOCAL LAND-OFFICE.

*Commissioner Drummond to Register and Receiver, Salt Lake City, Utah, April* 4, 1873.

Applicants for patent have the right to examine any and all papers that are filed with the register and receiver, in the nature of protests or adverse claims to their applications for patents, but in no case should the local land officers permit papers which have been filed with them to be taken out of their office.

OVERMAN *vs.* DARDANELLES.

*Commissioner Drummond to Register and Receiver, Carson City, Nevada, April* 11, 1873.

Your action in entertaining "a motion to dismiss the adverse claim,"

was wholly unauthorized by the law, the instructions issued thereunder, and the practice of this office.

The mining act of May 10, 1872, declares, "that where an adverse claim shall be filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided in a court of competent jurisdiction."

The register and receiver have no authority to "dismiss an adverse claim," nor to receive additional proof either from the applicant for patent, or the adverse claimant, after the time prescribed by law for publication has expired, and before the "controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived," unless such adverse claimant shall fail to commence proceedings in court within the time required by law, to wit, "within thirty days after filing his claim." In which last event the application will be allowed to proceed as if no adverse claim had been asserted.

Should the register and receiver decide that an adverse claim has been made out in proper form and stay proceedings upon the application for patent, the applicants for patent may appeal from such decision to the Commissioner of the General Land Office; and, on the contrary, should the local land officers decide that no adverse claim made in the proper form had been filed, the adverse claimants have the right to appeal from said decision to this office.

But in no event can additional proof of any kind be received upon such appeal.

Should an appeal be taken from your decision either that an adverse claim has been made out, or that it has not been made out, you will inform all parties in interest of such appeal, and forward all the papers in the case with such arguments as may have been filed by the respective parties, to this office for review and decision.

The appeal of the Dardanelles company from your decision granting the Overman company twenty days to file counter affidavits in case of the motion of the Dardanelles company to dismiss adverse claim, has been dismissed as you were informed on this day.

### OFFICIAL LETTERS.

*Commissioner Drummond to Register and Receiver, Austin, Nevada, April* 14, 1873.

All official letters sent to, as well as the official record of letters sent by the register and receiver, are the property of the United States, and as such should be retained in the office of such register and receiver.

### TUNNEL LOCATIONS.

*Commissioner Drummond to General George P. Ihrie, San Francisco, California, April* 15, 1873.

There is no provision of law for patenting tunnel locations. Such lodes, however, as are discovered in running a tunnel, may be patented, upon full compliance with the law.

MINERS CLAIMING ADVERSELY TO AGRICULTURISTS MAY BE CONFINED TO ORIGINAL LOCATIONS.

*Commissioner Drummond to Register and Receiver, Sacramento, California, April* 15, 1873.

The papers transmitted with the register's letter of October 15, 1872, in the case of John C. Ham, pre-emption claimant, *vs.* Louis Ludekins, R. K. McCoy and others, mineral applicants and affiants, have been examined.

The testimony offered at this hearing is, in some respects, conflicting and unsatisfactory. However, it appears that the mineral applicant has made a blind drain or tunnel, sunk shafts and run drifts at considerable expense, and obtained good prospects on his claim. In his testimony (page 32) he states that "by taking a legal subdivision, he included in his application land that was not embraced in his original location, and that he never claimed as mineral before."

The act of Congress, approved May 10, 1872, provides in the tenth section thereof that "where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed land." Mr. Ludekins will therefore be allowed to proceed with his application, embracing therein only so much land as is included in the original locations, made in accordance with the local rules and customs of miners, in the mining-district wherein the claim is situated.

The remaining portion of the land embraced in the pre-emption claim of John C. Ham is held to be agricultural in character, and will be dealt with accordingly.

Affirmed by Secretary Delano, November 19, 1873.

ERROR IN SURVEY.

*Commissioner Drummond to Josiah Dart, Boulder, Colorado, April* 17, 1873.

Where any material error occurs in the survey of a mining-claim, so as to mislead parties who may have a right to file adversely, or not to apprise them of the exact boundaries, extent, nature, and location of the claim, the applicant should commence *de novo*, by filing with the local land officers a plat and field-notes, "showing accurately the boundaries of the claim," and publish a notice accurately describing the claim, for the patent when issued must conform to and agree with the description as given in the plat and field-notes.

BORAX DEPOSITS.

*Commissioner Drummond to Register and Receiver, Los Angeles, Cal., April* 18, 1873.

Lands containing valuable deposits of borax cannot be entered under the agricultural laws of Congress.

Such lands may be entered, however, under the act of July 9, 1870, and the act of May 10, 1872, upon full compliance with the law and instructions; both of these laws providing for the patenting of lands claimed and located for "valuable deposits."

The proceedings required will be the same as are required in case of applications for patents for placer-mines.

KEYSTONE CONSOLIDATED *et al. vs.* STATE OF CALIFORNIA.

Distinction between an ordinary law and a legislative compact.
Public surveys in California and Michigan contrasted.
Land clearly agricultural in character may be designated and set apart by the Secretary of the Interior on the survey of the reserved mineral lands.
There can be no school section in a township until the lines of survey are run.
Proceedings in the application of the townsite of Amador.
Mining-claims are excepted from a townsite patent. Excepting clause will be inserted in mining patents within townsite limits.
The school-grant to California is not a grant *in presenti*, but is in the nature of a float.
The seventh section, act of March 3, 1853, excepts from the grant to the State of California lands in sections 16 and 36, upon which settlement has been made prior to survey.
Mineral lands were not granted to California by said act of 1853.

*Secretary Delano to Commissioner Drummond, April* 28, 1873.

SIR: I have examined the case of the Keystone Consolidated Mining Company, Original Amador Mining Company, Bunker Hill Quartz Mining Company, Eureka Quartz Mining Company, and townsite of Amador City *vs.* The State of California, on appeal to the Department from the decision of the Commissioner of the General Land Office of June 18, 1872.

The land in question is the east half of section 36, township 7 north, range 10 east, Mount Diablo meridian, in the State of California. The State claims the entire tract under the act of Congress of March 3, 1853, (10 Stat. 244, sec. 6,) as school land. The mining companies claim a portion of it under the act of July 26, 1866 (14 Stat. 251,) and Amador City claims a part of it under the act of March 2, 1867, (14 Stat. 541.) The land is mineral land, and said mining companies located their mines for most of the territory now claimed by them in 1851, and for the remainder in 1856, 1863, and 1864. They have continuously worked these mines from time of location to the present, and have expended on the same a large sum, exceeding $1,000,000, and have realized from them a still larger sum. They have complied with all the provisions of the act of July 26, 1866, and have made their respective applications in due time.

Amador City was located on the half section in controversy, in the immediate vicinity of said mines, in 1851, and then had a population of about seventy-five persons. It contained about three hundred inhabitants at the date of the act of March 3, 1853, and now contains about five hundred. It has about one hundred dwelling-houses, two stores, two saloons, one hotel, one post-office, one express office, one telegraph office, one church, and one school-house. It has filed an abandonment of all claim to any portion of the legal subdivisions upon which it is situated, so far as the same conflicts with the claim of either of the mining companies.

The survey of the township lines of said township 7 was completed August 27, 1869. The section lines were run March 10, 1870. The plat was approved September 30, 1870, and filed in the local office October 7, 1870. The State of California, on the fourth of November, 1870, sold to Henry Casey the east half of said section 36 for the sum of $400, and the claim to the same is now prosecuted by him or those who claim under him.

Upon these facts, it is conceded by all parties to this contest, that

each of the said mining companies is entitled to a patent for the lands claimed by it, unless the title for said half section is now vested in the State of California or its grantee. It is also conceded that the claim of Amador City is good and valid, unless in conflict with the title of the State or its grantee.

The local officers rejected the title of the State, and their decision was affirmed by the Commissioner.

The claimant under the State has appealed, and the whole case is now before this Department on its merits. It involves a construction of the act of March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes."

In attempting to ascertain the true meaning of this act, I shall assume, as horn-book law, that in every valid grant there must be a grantor capable of making the grant, a grantee capable of taking it, and a thing granted capable of identification with reasonable certainty; that all grants made by the General Government to individuals, corporations, or States, are to be construed strictly against the grantee, and that nothing passes by implication; that the intent of the law-makers is to govern, and that such intent is to be gathered from the entire act.

In the further examination of this case I propose to consider the following inquiries:

First. When does title vest in the State, to sections 16 and 36, under said act?

Second. Does the seventh section except from the grant, land upon which settlement has been made prior to survey for other purposes than pre-emption appropriation?

Third. Does the grant include mineral lands in sections 16 and 36?

First. When does title vest in the State to sections 16 and 36, under said act? Section 6 of the act reads as follows: "That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which shall be, and hereby are, granted to the State for the purposes of public schools in each township, and with the exception of land appropriated under the authority of this act or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one," etc.

It is claimed by appellant that this section contains a grant *in presenti* to the State, taking effect from the date of the act, upon all tracts afterward located by government survey on sections 16 and 36 in each township, and that complete title was vested in the State to the same on the 3d of March, 1853, and that Congress thereafter had no power to provide a way for a different disposition of any such lands. On the other hand it is claimed, on behalf of the mining and townsite companies, that the grant, though in words *de presenti*, was in fact a grant in the nature of a float, taking effect to vest title upon no specific tracts until survey, and that, until such survey, Congress had power to make other and different disposition of the land.

The power of Congress to change, modify, alter, or repeal the grant in question at any time prior to the date when title vests in the State,

will not, I think, be questioned, and it is equally clear that after title has once vested, Congress has no further power to alter, modify, or change the grant. It is evident, therefore, that, with reference to this branch of the case, it is only necessary to inquire whether title to sections 16 and 36 vested in the State prior to the act of July 26, 1866. If it did, then Congress had no power to dispose of the land in the manner pointed out in that act; if it did not, then the title of the mineral claimants is good, and patents must issue to them for the tracts claimed.

In my opinion, the sixth section of the act of 1853 should be construed as a grant to the State *in presenti*, in the nature of a float, taking effect upon specific tracts when the same are surveyed by the United States, and not before. The grant is in words *de presenti*, but until survey there are no tracts or parcels of land in existence, answering to the calls of the grant. A beneficial interest under it can only ensue to the State when the United States, in extending the lines of the public surveys, set apart certain tracts and designates them as sections 16 and 36. It will not be denied that Congress had the legal power, no matter what may be said of the political obligation of the Government, to provide that this land should never be surveyed, or that in surveying it a different method should be adopted than that now in use, and no such tracts as sections 16 and 36 be set apart. Would not the passage of such an act have operated to entirely defeat the grant to the State? The grant calls for certain tracts by recognized technical designations. No such tracts could be found, and the State would be without remedy to compel the government to create them. A like effect would be produced by a refusal of the executive officers of the government to extend the surveys. The State would be indefinitely without beneficial interest in the grant. Of course the happening of the contingency I have mentioned could hardly for a moment be apprehended, for the United States is, in good faith to the State, and in the performance of its political obligations, bound within reasonable time, in the extension of the public surveys, to set apart the tracts granted; but I refer to it to show the nature of the grant to the State and its liability to defeat before survey.

I think the grant is in nature the same as that usually made by Congress to railroad companies to aid in the construction of their roads. These grants are generally for a certain number of sections, designated by odd numbers on each side of the road, with a provision for indemnity selection, in case any of such sections shall have been sold or otherwise disposed of prior to the definite location of the line. The highest judicial authority (Railroad *vs.* Smith, 9 Wallace, 99; Railroad *vs.* Fremont Co., 9 Wallace, 90) has repeatedly held that these grants did not vest any right in the companies to specific sections until the line of the road was definitely fixed on the face of the earth. The grant to California by the act of 1853 is similar. It is for certain sections designated by numbers, the precise location of which cannot be definitely ascertained until survey. The grant in both becomes certain upon the happening of a contingency; in the former by definite location, in the latter by survey. In the railroad cases, the Supreme Court holds that title to specific tracts vests only on the happening of this contingency that makes the grant certain as to location. Why should not the same rule

be applied to the grant to the State, and the title held to be vested upon the happening of the contingency that makes that grant certain as to location?

In the case of Gaines *et al. vs.* Nicholson, (9 How., 365,) passing upon the right of the State of Mississippi to school sections under an act (2 Stat., 229) reserving section sixteen in each township for the support of schools, and two subsequent acts providing for indemnity to the State for loss of same by reason of interference with foreign grants and for leasing such lands for the support of schools, the Supreme Court said: "The State of Mississippi acquired a right to every sixteenth section by virtue of these acts on the extinguishment of the Indian right of occupancy, the title to which in respect to the particular sections became vested, if vested at all, as soon as the surveys were made and the sections designated."

The case of Cooper *vs.* Roberts, (18 How., 173,) although cited and relied upon by counsel for the State, seems not to sustain their position, but rather follows and affirms the principles enunciated in Gaines *vs.* Nicholson.

The United States, in her compact with the Territory of Michigan on her admission to the Union as a State, ratified July 22, 1836, appropriated to the State section 16 in each township for the benefit of schools. The land in controversy was surveyed in the summer of 1847, and designated as section 16. The right of the State to the same was contested by certain mining claimants asserting rights under a purchase from the Government of lead mines, under the act of March 1, 1847, to whom a patent had issued, reserving the right of the State. The court first examined the history of the usual grants to the States, upon their admission to the Union, for the benefit of schools, showing that these gifts were the result of a cherished policy on the part of the Government for the encouragement of popular education, and declaring that the compact with the States did not except mineral lands from the operation of the grant. The court then said: "We agree that, until the survey of the township and the designation of the specific sections, the right of the State rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title." The court then passed to the consideration of the question whether any such "legal impediment" was created by the act of 1847, and decided that there was not, for the reason that said act expressly excepted section 16 from its operation. The court then further inquired whether the execution of a lease to the mineral claimants by the Secretary of War, with the right of renewal upon the lessee's compliance with certain conditions, upon which lease the claimants, having continued in possession and complied with conditions, were allowed to make entry under the act of 1847, was a legal impediment preventing the title from vesting in the State, and held that it was not such an impediment, for the reason that the claim of the company was not perfect under the lease, the act of 1847, and the act of September, 1850, (9 Stat., 472.) The court said: "Hence, had

there been a legal impediment to the execution of the compact with Michigan, enacted either by the second section of the act of 1847, which separated, for some purposes, the mineral from the public lands, or by the privileges granted to the lessees or their assigns, in the third section of that act, it was removed by the repealing clause of the act of 1850, and the non-compliance with the conditions on which the privileges depended."

It is thus seen that even in the case of a compact between the United States and the State of Michigan, duly ratified by the State, (a much stronger case than that of the simple grant, by an ordinary act, to the State of California,) the Supreme Court recognized the power of Congress, by subsequent legislation, to interpose a legal impediment to the title to school sections vesting in the State upon survey. There was no intimation that this power of Congress was doubted by the court. It was plainly recognized in every inquiry, and the title of the State was affirmed on the sole ground that no such impediment existed.

In the case of Kissell *vs.* St. Louis Public Schools, (18 How., 19,) in discussing the right of the school commissioners of St. Louis to certain out-lots, town lots, etc., reserved for the use of schools by the act of June 13, 1812, (2 Stat., 148,) and the confirmatory act of January 27, 1831, (4 Stat., 435,) which said lots were to be surveyed under the provisions of the first-mentioned act, the court said: "Our opinion is that the school lands were in the condition of Spanish claims after confirmation by the United States, without having established and constructed boundaries made by public authority, and which claims depended for their specific identity on surveys to be executed by the government. The case of West *vs.* Cochran, (17 How., 413,) lays down the dividing line between the Executive and judicial powers in such cases, to wit, that until a designation, accompanied by a survey or description, was made by the surveyor-general, the title attached to no land, nor had a court of justice jurisdiction to ascertain its boundaries."

In the case of Van Valkenberg *vs.* McCloud, (21 Cal. S. R., 330,) the supreme court of California, in construing the five hundred thousand acre grant to the State, under the act of Congress of September 4, 1841, (5 Stat., 453,) held that selections could be made thereunder prior to the survey of the land, subject to subsequent change to conform to the government lines; but this decision was overruled in the subsequent cases of Terry *vs.* Megerle, (24 Cal., 624,) Grayson *vs.* Knight, (27 Cal., 507,) and Middleton *vs.* Lowe, (30 Cal., 596.) In the latter case, referring to the decision of Grayson *vs.* Knight, the question being one relating to the right of the State to sections 16 and 36, under the act of 1853, the court said: "The reasons operating to prevent the State or her vendee from acquiring a title by the aid of selection made, as in that case before the Congressional survey, are equally cogent to show that title to any particular parcel of the lands granted for the purposes of public schools, does not vest in the State until such survey has been made. * * * It thus appears that the grant to the State has not attached to the land in controversy, (section 36,) both because of the exception to the act of Congress in favor of private grants, and because the lands have not been surveyed by the United States."

The case of Higgins *vs.* Houghton, relied upon by counsel to sustain

the claim of the State, seems rather, upon a careful examination, to sustain an opposite view of the law from that contended for. The case involved a question as to the right of the State under the act of 1853 to sections 16 and 36, and the court said: "We consider that in the grant to California of March 3, 1853, the power of locating the quantity granted, 1,280 acres, in effect in two parcels in every township, was reserved by the government, and as fast as townships thereafter were surveyed and sectionized, that the State became the owner of the sixteenth and thirty-sixth sections absolutely, not only as to quantity, but as to position also. Township No. 13 was surveyed and properly subdivided subsequent to the grant and prior to May 20, 1861; and since the date of that occurrence the State, by the effect of the grant, and by the law of the event, has been and is now the absolute and several owner of the sixteenth and thirty-sixth sections of that township as against the government. If there is any legislation by Congress prior to the grant which would interfere with the conclusion, as the objection in effect supposes, it has not been brought to our notice; and if there has been any legislation since the grant that conflicts with the conclusion, it must be null and void, unless, indeed, it has been acceded to by the grantees." The court here distinctly holds that when township No. 13 was surveyed and properly subdivided, the State, by the effect of the grant and the law of the event, acquired an absolute and several ownership to the sixteenth and thirty-sixth sections. This is what I hold to be the true interpretation of the act, and I have no doubt that, after such survey, the title of the State in agricultural lands was vested and beyond the reach of Congress. I do not understand the reference by the court to possible legislation of Congress to mean anything more than that any subsequent legislation attempting to interfere with this vested right would be null and void.

I find strong support for the view I have expressed in other portions of the act of March 3, 1853, and in contemporaneous legislation. The seventh section provided that where the sixteenth and thirty-sixth sections should be reserved for public uses before the same should be surveyed, other land should be selected by the proper authorities of the State in lieu thereof. At the passage of the act no reservations of lands for public uses in California, or comparatively none, had been made. The public lands were unsurveyed, and reservations would be needed for light-houses, forts, arsenals, fortifications, and Indian reservations. There were then over 60,000 Indians in the State, and provision would necessarily be required for them. In fact, Congress did provide for five Indian reservations in California, of 25,000 acres each, on the very day this act was passed, (10 Stats., 238.) Is it for a moment to be supposed that Congress would, by the sixth section, give to the State an absolute vested right in all lands that should fall upon sections 16 and 36, and in the very next section provide that it should have no right whatever in any of said sections which might thereafter be reserved, before survey, for public uses, but should be compelled to take other lands in lieu thereof? I cannot believe that it so intended.

In opposition to the reasons and authorities above set forth, counsel for the State have cited several cases, which they claim sustain a different construction of the act, and which I will now consider. The first of these is Rutherford *vs.* Greene, (2 Wheat., 196.) In 1782, the State of

North Carolina passed an act, by which the State reserved a tract of land for the relief of officers and soldiers in the continental line, and appointed a board of commissioners to set off the lands allotted to each. The tenth section provided "that 25,000 acres of land shall be allotted for and given to Major-General Nathaniel Greene." The commissioners allotted 25,000 acres to General Greene, and caused the tract to be surveyed, which was done on the eleventh of March, 1783. It was claimed that the words "shall be allotted" did not import a grant, and that the legislature, after the allotment and survey, had made a different disposition of the land in controversy; but the court held that the title of Greene was valid. Chief-Justice Marshall, in delivering the opinion of the court, said: "As the act was to be performed in future, the words directing it are necessarily in the future tense. 'Twenty-five thousand acres of land shall be allotted for and given to Major-General Nathaniel Greene.' Given when? The answer is unavoidable. When they shall be allotted. Given how? Not by any future act, for it is not the practice of legislation to enact that a law shall be passed by some future legislature, but given by force of this act." "Nothing can be more apparent than the intention of the legislature to order these commissioners to make the allotment, and to give the land, when allotted, to General Greene." * * * "The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina, had now become a particular gift of the 25,000 acres contained in the survey." * * * "It is clearly and unanimously the opinion of this court that the act of 1782 vested a title in General Greene to 25,000 acres of land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey, made in pursuance of that act and returned in March, 1783, gave precision to that title and attached it to the land surveyed; that his rights are not impaired by the act of 1783 and the entry of appellant, all of which are subsequent to his survey."

It would be difficult for the learned counsel to find a case more in conflict with the doctrine which it is cited to support.

In Lessieur *vs.* Price, (12 How., 59,) the Supreme Court construed the act of Congress of March 6, 1820, (5 Stats., 545,) which enacted "that four entire sections of land be, and the same are hereby, granted to the said State (Missouri) for the purpose of fixing the seat of government thereon; which said sections shall, under the direction of the legislature of said State, be located as near as may be in one body, at any time, in such townships and ranges as the legislature aforesaid may select, on any of the public lands of the United States."

Four sections were selected which were claimed under a New Madrid location, and it became material for the court to fix the time at which title vested in the State to the lands selected. The court said: "The land was granted by the act of 1820; it was a present grant, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in Rutherford *vs.* Greene's Heirs, (2 Wheat., 196,) that the act of 1820 vested a title in the State of Missouri of four sections: and that the selections made by the State legislature, pursuant to the act of Congress, and the notice given of such location to

the surveyor-general, and the register of the local district where the land lay, gave precision to the title and attached to it the land selected." And again: "The next inquiry is as to the date when the land selected attached to the grant. June 28, 1821, the governor of Missouri notified the surveyor-general of the fact that the land had been located by the commissioners, and awaited the action of the legislature; and on the 31st day of December, 1821, the land was accepted by the legislature. The same act provides for laying off a town and the establishment of the seat of government thereon. And as the commissioners had power to locate, and did so, subject only to legislative sanction of their report, and that report was sanctioned, our opinion is that the acts were concurrent, and that the title refers to the first act, and therefore that the State took title from the 28th of June, 1821, when the surveyor-general was notified that the location had been made."

Thus it appears that, although the court held that the grant was a present one, it also held that title to the particular sections did not vest on the 6th of March, 1820, the date of the act, but did vest on the 28th of June, 1821, the date when the surveyor-general was notified of the selection.

By parity of reason it should be held in the case now under consideration that, although the grant to the State by the act of 1853 was a present grant, yet it did not vest title to sections 16 and 36 until a survey had been made which "gave precision to the title, and attached to it the land surveyed."

In Howe *vs.* The State of Missouri, (18 Howard, 126,) the court held that the grant to the State of section 16 in contest, by act of March 6, 1820, (2 Stats., 547,) adopted by ordinance declaring the assent of the State thereto, July 19, 1820, was not affected by the subsequent confirmation by Congress of a Spanish claim theretofore rejected by the board. It appears, however, that the particular section in contest in that case was surveyed prior to the passage of the act confirming the Spanish claim, and that three of the justices dissented from the opinion of the court, if intended to go further than to hold that, although the tenth section of the act of March 3, 1811, prevented title from vesting in the State until final decision by Congress on the claim of Vallé, (Spanish claimant,) yet the act of May 24, 1828, confirming lands to Vallé, operated as such final decision, and excepted from confirmation so much land as was included in section 16 then surveyed.

In the case of Veeder *vs.* Guffey (3 Wis., 520) it was held that the act of Congress approved August 8, 1846, took effect upon the admission of the Territory of Wisconsin to the Union as a State; that it vested in the State the title, potentially, to a quantity of land equal to three sections in width on each side of the Fox River, and determined the location of the lands to be the alternate sections on each side of the river, requiring only the ministerial acts of survey, selection, and approval to render the specific parcels which would fall to the State or the United States definite and fixed, and that, by the grant, the State, upon admission to the Union, became seized of one-half of the lands on each side of the Fox River; and, the mode of partition being established by the grant, it was competent for the State to provide modes and terms of sale. It will be noticed that in the act of 1846 are descriptive words

very dissimilar from those used in the act of 1853, being as follows: "A quantity of land equal to one-half of three sections in width on each side of said Fox River;" and also that by the second section of the act it is distinctly provided "that, as soon as the Territory of Wisconsin shall be admitted as a State into the Union, all the lands granted by this act shall be and become the property of the State." This express provision of the second section, and the peculiar character of the descriptive words, seem to have governed the court in its decision as to the time when the title vested in the State.

Secretary Stuart, September 10, 1851, (1 Lester, 495,) in passing upon the grant to Michigan of school sections, already referred to, in citing the case of Cooper *vs.* Roberts, (18 How., 173,) said: "I regard it as an absolute grant of every sixteenth section which had not on the twenty-third of June, 1836, been sold or otherwise disposed of, whether then designated by survey or not." This decision was followed by Acting Secretary Otto, July 10, 1867, in a case involving the construction of the act of 1853, under which the State of California claims. In this case the Acting Secretary said: "The sixth section of the act entitled 'An act to provide for the survey of the public lands in California,' etc., approved March 3, 1853, granted to the State of California, of the public lands, whether surveyed or unsurveyed, sections 16 and 36, for the purposes of public schools in each township."

From this quotation it would appear that the Acting Secretary construed the sixth section as though it read "with the exception of sections 16 and 36, which, whether surveyed or unsurveyed, shall be and hereby are granted to the State for the purposes of public schools," etc. I think it should be construed as though it read as follows:

"*And be it further enacted*, That all the public lands in the State of California, whether surveyed or unsurveyed, shall be subject to the preemption laws of fourth of September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as herein otherwise provided, and with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands."

I have been shown a newspaper report of a late decision of the supreme court of California, in the case of Sherman *vs.* Buick, in which that court held that the act of March 3, 1853, vested an absolute title in the State to sections sixteen and thirty-six from the date of the passage of the act, and that Congress thereafter had no power to dispose of said sections before survey. The opinion of the court is very brief. It cites and relies upon the former rulings of the court in the cases therein mentioned, which cases, as I understand them, do not go to the full extent claimed for them.

This decision is not satisfactory to my mind, and I apprehend is not entirely satisfactory to the learned court which pronounced it, as I am informed, that a rehearing has already been allowed.

I am satisfied, upon full consideration of all the cases cited, and the exhaustive arguments of the able counsel representing all parties in in-

terest, that the weight of authority is clearly in favor of the construction I have given above.

Second. Does the seventh section except from the grant land upon which settlement had been made prior to survey for other purposes than pre-emption appropriation?

The seventh section of the act of 1853 is in part as follows:

"*And be it further enacted*, That when any settlement by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, or when such sections may be reserved for public use or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof."

It is claimed on behalf of the mineral claimants that this section excepts from the operation of the grant all lands in sections 16 and 36 upon which a settlement of any kind had been made, prior to survey, by the erection of a building or buildings, or the cultivation of any portion of the land, whether such settlement was made with a view to pre-emption, or for entry as townsites, or otherwise. On the part of the State it is claimed that the exception includes only settlements made with a view to pre-emption, and that none other would protect sections 16 and 36 from the grant.

The language of the seventh section is not so clear as to be entirely free from doubt, but a careful examination of the terms used, and a consideration of the various objects evidently intended to be accomplished by Congress in its passage will show, I think, that the exception includes more than simply settlements with a view to pre-emption.

I call attention to the language used: "That where any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections," etc. A person may erect a dwelling-house on or he may cultivate a portion of a tract of land without acquiring a pre-emption claim. Both the erection of a house and cultivation are requisite on the part of a pre-emptor.

If Congress had intended to limit the settlement of what is technically known as a pre-emption settlement, I think it would have used more apt words to express such intent. It would have said "that where any pre-emption settlement shall be made," etc. It has done no such thing; but, on the contrary, has adopted such a mode of expression as, to my mind, negatives the idea that a pre-emption settlement alone was intended.

To limit the exception to settlements made by pre-emption claimants would be to protect comparatively few of the actual settlements in any of the mining districts, and to award to the State many very valuable and lasting improvements made under authority and sanction of law and the usages of the country. It is a notorious fact that few, if any, settlements in the early days of California were made in any portion of the State for the purposes of agriculture. Emigration was drawn to the State, and settlements made almost entirely with a view to developing and working the newly-discovered mines. The miners located in villages and small settlements, cultivating the land only so far as was necessary in following their occupation of mining. Under the construction of the act contended for by the State, none of the settlements or improvements

so made were protected from the grant, except, perhaps, townsites upon purely agricultural lands. Is it reasonable to suppose that Congress intended to protect isolated pre-emption claimants, and at the same time to grant to the State the valuable improvements of miners, and in some instances include whole villages in the vicinity of the mines? The eighth section of the act expressly provided that the public lands (not mineral) occupied as towns or villages should not be subdivided or subject to sale or appropriation by settlement under the provisions of the act, but should be subject to the townsite act of May 23, 1844, except townsites on or near mineral lands, the inhabitants of which should have the right of occupancy or cultivation only until such time as Congress should dispose of the same. I do not suppose it will be doubted that this section excepted from the grant of the State any such townsites found by survey upon agricultural land in sections sixteen and thirty-six; but if the construction of sections six and seven, contended for by the State, be allowed, it is clear that a town located on or near mineral lands would pass to the State under the grant. Can it be for a moment supposed that Congress intended to hold out inducements to miners to settle on or near mineral lands in towns and villages, and by the very same act give their improvements away to the State, while protecting some, and these the solitary agricultural settlers?

One of the great objects of the act seems to be in providing for the disposition of the public lands, according to the various elements claiming recognition, and to protect each interest created from encroachment by the others. The seventh section was intended to protect all settlements made upon the public land before survey from the grant to the State, which, from its peculiar nature as to final position, threatened every settler whose claim or improvements were not bounded by subdivisional lines of public surveys. This intention of Congress would be defeated by the construction contended for by the State.

I am of opinion, therefore, that the seventh section of the act excepts from the grant to the State lands upon sections 16 and 36, upon which any settlement, by the erection of a building or buildings, or the cultivation of any portion of the land, has been made prior to survey.

Third. Does the grant include minerals lands in sections 16 and 36?

In my opinion Congress, by the act of 1853, did not intend to grant, and did not grant, to the State any mineral lands that, by survey, are shown to be sections 16 and 36. The act was passed soon after the discovery of the great mineral wealth of California had been made. The attention of the country and of Congress was called to the question of the disposition of such lands. No plan had been adopted. Congress for the first time undertook to legislate in regard to the public lands in that State.

A careful examination of the act will show that Congress did not intend to dispose of any of its mineral lands, but contemplated a future disposition of them. The eighth section provides that the inhabitants of towns located on or near mineral lands shall have the right of occupation and cultivation "only until such time as Congress shall dispose of the same." It evidently did not then suppose that it was disposing of a considerable portion of them. The act, in a great many of its provisions, very carefully reserves the mineral lands from its operation. Thus, in the sixth

section, it is provided that the mineral lands shall be excepted from the lands subject to the pre-emption laws; in the seventh section it is provided that no person shall obtain the benefits of this act "by a settlement or location on mineral lands," and in the eighth section it is provided that the inhabitants of towns located on or near mineral lands shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same. And, in the twelfth section, it is provided that the State shall have the right to select two townships, or seventy-two sections, for the use of a seminary of learning: "*Provided, however*, That no mineral lands shall be subject to such selection;" and in the thirteenth section the State is given the right to select ten sections for the purpose of erecting the public buildings of the State: "*Provided, however*, That none of said selections shall be made of mineral lands." Why all this care and painstaking to exclude mineral lands from these minor provisions, if it were intended to give the State mineral lands in the major provision relating to the sixteenth and thirty-sixth sections? I think Congress intended to reserve all the mineral lands from the operation of the act, and that there might be no doubt about this reservation as to the sixteenth and thirty-sixth sections, it expressly provided in the third section "that none other than township lines shall be surveyed when the lands are mineral." As I have before attempted to show, the grant could not take effect until survey, and this third section, which must be construed as a part of the act, and in connection with all its other provisions, expressly prohibits the only survey that could possibly locate these sections. It therefore, in connection with the other express reservations, satisfies my mind that Congress did not intend to make a grant of mineral lands to the State, and that those members of Congress who undertook to speak for the committees having the matter in charge were correct when they stated in debate that no mineral lands were granted by the act. (See *Cong. Globe*, vol. 25, pp. 1036–1038.)

I regard the act of July 26, 1866, as providing an exclusive method for appropriating the mineral lands of the United States. It was the first act passed by Congress, and perhaps the first ever passed by any government, which undertook to dispose of its mineral lands. It provided in its first section, "That the mineral lands of the public domain," (which is equivalent to saying all the mineral lands of the public domain,) "both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the locals customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

It required every person claiming any mine to occupy and improve the same, and to expend thereon in labor or improvements not less than $1,000, and to do and perform certain other things. It limited the location of any individual to two hundred feet along the vein, with an additional two hundred feet for discovery, and any association to not more than three thousand feet, and required payment at the rate of $5 per acre. It provided that when the mineral lands should be surveyed the Secretary of the Interior might designate and set apart such portions of

the same as were clearly agricultural, and that the same should be subject to pre-emption and sale as other public lands. In short, it adopted a system for the disposition of the mineral lands, and such a system as would give every citizen an equal opportunity to engage in the business of developing them. It was evidently intended to be the only method by which mineral lands could be appropriated. It made no exceptions in favor of school or other grants.

If the State should obtain two sections in every mineral township, it might establish a mineral system for itself, and one in conflict with that of the General Government. In my opinion Congress never intended to make such a state of things possible.

No surveys of mineral lands were authorized or made until the passage of the act of July 9, 1870, (16 Stat., 217, sec. 16,) and long after the passage of the act of 1866.

I am constrained to hold that no mineral lands were granted by the act of 1853. If I am in error the State can lose nothing, for she has an easy method of presenting the question for decision of the Supreme Court, where it will doubtless finally go. If, however, my decision should be in favor of the State, and it should be erroneous, there would be very many cases in which I am unadvised of any way by which the error could be corrected.

I affirm your decision.

*Commissioner Drummond to Register and Receiver, Sacramento, California, May* 14, 1873.

I enclose herewith a printed copy of the decision of this office and of the Hon. Secretary of the Interior in case of the Keystone Mining Company, Eureka Quartz Mining Company, Original Amador Mining Company, Bunker Hill Quartz Mining Company, and the Townsite of Amador City *vs.* The State of California. You will allow said companies to proceed with their applications for patents.

In accordance with this decision you will decline to certify to the State any land lying in sections sixteen or thirty-six, which has been returned as mineral by the surveyor, where, by orders from this office, the land is suspended from disposal until the non-mineral character thereof is shown by proof taken after due notice, or where affidavits have been filed alleging the land to be mineral, until this office shall have decided upon the testimony that the tract in question is not mineral land, and that the State is entitled thereto under the grant of March 3, 1853.

WAR EAGLE MINE.

**Adverse claim was rejected because not properly made out. A resurvey of the surface-ground embraced in the application was ordered.**

*Commissioner Drummond to Register and Receiver, Salt Lake City, Utah, May* 1, 1873.

The papers transmitted with your letter of the eighteenth of February last, in case of the application of Moses Hirschman and William Ottenheimer for patent for fifteen hundred linear feet of the War Eagle Mine, American Fork mining-district, Utah, have been examined.

On the fourteenth of November, 1872, Moses Hirschman and William Ottenheimer filed in your office an application for patent for 1,500 linear

feet of the War Eagle Mine, the *locus* and boundaries thereof being fully set forth in the notices and diagrams posted upon the claim and in the office of the register.

Notice of intention to apply for a patent was published for the full period of time, required by law, in the *Utah Mining Journal.*

The abstract of title on file with the case shows that the applicants for patent have the record title to 1,500 linear feet of said mine, by purchase from the original locators and their grantees.

It appears that a greater width of surface-ground is embraced in said application for patent than the local law allows. If this be true, the width of the claim must be diminished to conform to the local law before entry.

The applicants also filed proof of citizenship, and proof of compliance with the law and instructions of this office. On the eleventh of January, 1873, A. H. Huyett filed in your office an adverse claim to said application. This adverse claim is informal, and insufficient to suspend proceedings upon said application for patent, for the following reasons:

Said adverse claim is not made out in the form prescribed by the act of May 10, 1872, and the instructions of this office thereunder.

The seventh section of the mining act of May 10, 1872, declares "that where an adverse claim shall be filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim," etc.

The instructions of this office contained in circular of June 10, 1872, paragraph forty-nine, require that, "in order that the 'boundaries' and 'extent' of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his claim and the relative situation or position with the one against which he claims, so that the extent of the conflict may be the better understood. The plat must be made from an actual survey by the United States deputy surveyor, who will officially certify thereon to its correctness, and in addition there must be attached to such plat of survey a certificate, or sworn statement, by the surveyor as to the approximate value of the labor performed or improvements made upon the claim of the adverse party," etc.

The record does not show that any survey was made of the premises claimed adversely.

A diagram or plat was filed, which it appears was not "made from an actual survey by a United States deputy" or other surveyor. There is no certificate or sworn statement attached to said plat or diagram signed by a deputy or other surveyor as to the correctness thereof.

There is no "certificate or sworn statement by the surveyor as to the approximate value of the labor performed, or improvements made upon the claim of the adverse party," either attached to said plat or on file with the case.

In short, there is nothing in the record to show that the adverse claimant has complied with the law and instructions, requiring him to have an actual survey of the premises made.

To entitle parties to have their adverse claims considered, they must comply fully with the law and instructions, as set forth in circular of June 10, 1872.

Mr. Huyett filed copies of deeds from John T. Lynch *et al.*, which show that the grantees conveyed by quit-claim deeds to Mr. Huyett whatever right, title, or interest they may have had in the Crusade mine, but no abstract of title is on file showing when the Crusade mine was located, the number of locators, the extent of such location, or that said Lynch *et al.* had any interest in the mine whatever.

The adverse claimant having failed to comply with the law and regulations, requiring him to show, under oath, the nature, extent, and boundaries of his adverse claim, and, therefore, having failed to make out a case showing a formal conflict with the claim of Hirschman and Ottenheimer, the law does not authorize a suspension of proceedings.

Where parties applying for patents for mining-claims strictly comply with the law and instructions, this office is not authorized to suspend proceedings upon their said applications, at the instance of parties who comply with neither the law nor instructions.

The application of Messrs. Hirschman and Ottenheimer will therefore be taken up in its regular order, and disposed of as though no attempt had been made to file an adverse claim.

[NOTE.—May 13, 1873, the surveyor-general of Utah, at Salt Lake City, was directed by telegram to "make new plat and field-notes of War Eagle mine, in conformity with decision sent register and receiver the first instant."]

PROOF WHERE THERE ARE NO LOCAL DISTRICT LAWS.

*Acting Commissioner Curtis to Hoyt, Sears & McKee. San Francisco, California, May* 16, 1873.

In the absence of local district laws, applicants are required to show compliance with the mining acts of Congress in force at the date of their locations.

PLACER-CLAIMS.

Tenth section, act of May 10, 1872, (section 2331 R. S.,) construed.

*Acting Commissioner Curtis to Surveyor-General Blaine, Helena, Montana, May* 19, 1873.

The construction given by this office to the tenth section of the mining act of May 10, 1872, is transmitted for your guidance.

Said section declares that "where said placer-claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining-claims hereafter located shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys. * * * But where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands," etc.

From the foregoing it will be seen that placer mining-claims located after May 10, 1872, must conform as nearly as practicable with the public surveys. In other words, the location of a placer-mine upon surveyed land, made after May 10, 1872, should embrace legal subdivisions of the public lands, where the same can be done without interfering with the rights of other *bona fide* mineral, agricultural, or other claimants in the same tract.

Where placer-mines are situate upon unsurveyed land, or where, by reason of some other *bona fide* claimant, a legal subdivision of surveyed

land cannot be embraced in an application for patent, a survey must be made of the premises for which a patent is sought, in accordance with circular instructions of June 10, 1872.

MOUNTAIN TIGER, ZELLA, AND ROCKWELL LODES.

**One adverse claim was rejected because filed against three applications. Another rejected because no interest was shown. Minority of adverse claimant considered.**

*Acting Commissioner Curtis to Register and Receiver, Salt Lake City, Utah, June* 9, 1873.

This office has examined the papers in case of the application of Norris W. Mundy and Joseph R. Walker, for patent for the Mountain Tiger lode; the application of J. R. Walker, for patent for the Zella lode; the application for patent for the Rockwell lode, made by J. R. Walker.

Two of said applications for patents were filed in your office on the fifth March, 1873, to wit, for the Mountain Tiger lode and the Rockwell lode.

The application for patent for the Zella lode was filed in your office on the eleventh March, 1873. The applicants for patent have shown a strict compliance with the law and instructions in each case.

On the third May, 1873, a protest was filed in your office against said applications for patents, which protest is sworn to by Thomas Davis, as attorney for William W. Daly, Charles Gippert, H. S. Haines, and Edward Bell; attached to said protest is a diagram made by Thomas Davis, who, it appears, is not only attorney for said protestants, but also deputy mineral surveyor. This protest is informal, and insufficient to warrant this office in suspending proceedings upon said applications, and for the following reasons:

It is contrary to the spirit and letter of the law and the practice of this office to permit one person or association of persons to file one protest against several applications for patents for separate and distinct lodes. In the cases under consideration, there were three separate and distinct applications for patents for three separate and distinct lodes. Each application is an entirety, and rests upon its own merits.

As each application for patent under the mining act is for a separate and distinct portion of mineral land, parties who desire their adverse claims considered must file a separate and distinct adverse claim against each application separately.

Adverse claimants who desire to have their adverse claims considered must strictly comply with the law and instructions, and file with the local land officers, within the time prescribed by law and in proper form, a separate and distinct adverse claim against each application which it is alleged conflicts with the premises owned by such adverse claimants.

Where applicants for patents strictly comply with the law and instructions, the adverse claimants will also be required to strictly conform to the instructions of this office and the laws of Congress.

In the cases under consideration it is not clear how the protestants could in any way be injured or their rights prejudiced by the issuance of patents as applied for, as the New Era location is of much later date than that of either the Zella, Rockwell, or Mountain Tiger mines, the mining act of May 10, 1872, sec. 14, providing what the respective rights

of the parties shall be where "two or more veins intersect or cross each other."

The protest of Wm. W. Daly *et al.* is not, in the opinion of this office, such an adverse claim as is contemplated by the mining act, and cannot operate as a bar to issuance of a patent as applied for.

On the eighth April, 1873, George C. Bates, as attorney for W. C. Anderson, filed a protest against the application for patent for the Zella mine. It appears from the papers in the case that, on the first November, 1870, James Keller, George Carleton, J. E. Dickerson, E. J. Elzy, D. E. Cameron, and W. C. Anderson located twelve hundred linear feet of the Zella lode; and that on the twenty-sixth November, 1870, W. C. Anderson sold his interest in said mine to Geo. W. Eaton and Joseph Leighton, and that the applicant for patent has the record title to the whole twelve hundred feet by purchase.

It appears that W. C. Anderson was not of age at the date of said location, and that he is now but twenty years of age. In his said protest he claims that his conveyance of said premises was null and void, he being a minor at the date thereof.

It appears that W. C. Anderson made this location in his own name. If he, being a minor, was doing business for himself and in his own name, as appears from the testimony, he had the right to dispose of whatever he acquired by virtue of said location.

If it was necessary for his guardian to execute the deed of conveyance to Eaton and Leighton, hereinbefore referred to, it was also necessary that his guardian should assert the adverse claim to said application for patent.

It appears that W. C. Anderson, on the second December, 1872, by his guardian, executed a deed for said two hundred feet in the Zella mine to the applicant for patent. From the foregoing, it is evident that whatever right, title, or interest W. C. Anderson may have had to the Zella lode by virtue of location, is now in the applicant for patent, and the protest asserted by him is not, in the opinion of this office, such an adverse claim as would warrant this office in suspending proceedings upon the application for patent.

HOW A VEIN LONGER THAN FIFTEEN HUNDRED FEET MAY BE LOCATED.

*Acting Commissioner Curtis to Hoyt and Brothers, Helena, Montana, June* 17, 1873.

There is no provision of law to prevent parties from locating other claims upon the same lode, outside of the first location made on the lode or vein.

If a lode or vein three thousand feet in length is discovered, two locations may be made, each of fifteen hundred feet thereon.

RED WARRIOR LODE.

**Application for patent was rejected because of insufficient and improper notice.**

*Acting Commissioner Curtis to Register and Receiver, Salt Lake City, Utah, June* 18, 1873.

This office has carefully examined the papers in case of the application of I. C. Bateman, for patent for the Red Warrior lode, West Mountain mining district, Utah.

The application for patent for said mine bears date October 4, 1871, and the indorsement made by the register thereon shows that the notice of intention to apply for a patent and a diagram of the claim were posted in his office from the fourth October, 1871, to the eighth January, 1872.

By the affidavit of John R. Murphy and Benjamin F. Oliver, it appears that a copy of said notice and diagram was posted upon the claim from the fifth October, 1871, to the fifth January, 1872.

By the affidavit of Frank Kenyan, it appears that the notice was published in the *Salt Lake Review* for a period of ninety days, commencing September 9, 1871.

In the application for patent, in the notices and diagrams posted upon the claim, and in the office of the register, and in the published notice, the claim is described as follows:

"The discovery monument of said claim is located about two miles southeast from the town of Bingham, at the head of Bingham cañon, at or near the furnace-site to the undersigned belonging. * * * From the discovery monument said claim runs N. 36° 30′ E. 600 feet and S. 36° 30′ W. 600 feet," etc.

On the twenty-ninth April, 1872, Thomas Fitch, attorney for the applicant for patent, informed this office by letter that the location of the mine had been given inaccurately in the application for patent, "the mines being described as in a southeasterly direction from Bingham City, whereas it should be southwesterly."

From an abstract of title, certified to by the district recorder, it appears that I. C. Bateman and four others located 1,200 linear feet of the Red Warrior lode on the twenty-fourth January, 1871.

There is no record evidence on file in this office to show that Mr. Bateman has ever purchased the rights of his co-locators, or that he has the record title to more than 240 linear feet of the Red Warrior lode.

From the foregoing it will be seen that the proceedings in the matter of this application for patent have been very informal and irregular, and not in accordance with the law and instructions.

This application for patent was filed under the act of July 26, 1866.

Said act requires the applicant for patent to file with the register and receiver an application for patent, with a diagram of the premises sought to be patented, and "that upon the filing of the diagram, as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land-office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days."

In the case under consideration the notice was published nearly a month prior to the date of the application, and for the same length of time before the notices and diagrams were posted on the claim and in the office of the register, and not during the ninety days of posting notices.

The description and location of the premises as given in said notices and diagrams were very meagre, and acknowledged by the attorney for the applicant to be incorrect.

The evidence submitted by the applicant shows that he has the record title to 240 linear feet only, while the application is for 1,200 feet.

In view of these informalities and irregularities this office would not be authorized to issue a patent upon said application, even though it had been clear of adverse claims, and the same is accordingly rejected.

REVIEW OF SAME.

On the eighteenth of June last, this office rejected the application of I. C. Bateman for patent for the Red Warrior lode, West Mountain mining district, Utah, for the following reasons, to wit:

First. On account of insufficient and erroneous description of the premises in the application for patent, the published notice, and the notices and diagrams posted upon the claim and in the office of the register.

Second. Because the notice was not published the same ninety days that the notices and diagrams were posted; the notice having been published on the ninth of September, 1871, and for ninety days thereafter, while the notices and diagrams were posted upon the claim October 5, and in the register's office on the fourth of October, 1871.

Third. For the reason that there was no record evidence on file to show that Mr. Bateman had the possession, or the right of possession, to 1,200 linear feet of the Red Warrior lode, the abstract of title showing that Mr. Bateman had the record title to 240 linear feet only.

On the seventh instant, Mr. Bateman made application for a rehearing of the case, and filed an abstract of title from the office of the county recorder, which shows that the applicant has now the record title to 1,200 linear feet of said lode. It also shows that the record title to said lode was in D. E. Buell and I. C. Bateman at the date of the application for patent, and that the applicant became the sole owner of said lode on the twenty-second of August, 1872, nearly eleven months after a patent had been applied for.

Mr. Bateman also filed an affidavit in the case.

After a careful consideration of the matter, said application for a rehearing is overruled.

INDIAN TERRITORY.

*Commissioner Drummond to R. H. Angwin, Sherman, Texas, June* 26, 1873.

The minerals in the Indian Territory are reserved by the United States, and this office has no control whatever over the lands in said Territory.

SAN XAVIER MINE.

Application for patent was rejected because the claim not legally located. Locations in Arizona considered.

*Commissioner Drummond to Register and Receiver, Prescott, Arizona, July* 10, 1873.

On the twenty-fourth March, 1873, you were directed to call upon M. B. Duffield and J. Q. Dickason, who made mineral entry No. 3, at your office, of the San Xavier mine, for proof of ownership and possession under the local rules or regulations of miners in Tucson mining district, Pima county, Arizona Territory.

With the register's letter of May 6, 1873, was received a copy of notice of location of the San Xavier mine, duly certified under the seal

of the county recorder of Pima county. This location-notice shows that five persons, M. G. Gay, Wm. Kirkland, Fritz Courtzen, Calvin Cuzinno, and John Davis, who doubtless acted in entire good faith in the matter, claimed and located 3,600 feet of this lode.

But this location was made on September 11, 1866, nearly two months after the passage of the Congressional mining enactment of July 26, 1866, the first section of which declares "that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode," etc.

There was, then, on the eleventh September, 1866, no authority of law for the location of thirty-six hundred feet of a lode by five persons; twelve hundred feet being the greatest extent then subject to location by five persons, provided they were the discoverers, or one thousand feet if claimed simply as locators; and this office is accordingly unable to issue a patent upon said application as it now stands, being for three thousand feet of said San Xavier mine.

You will inform the applicants for patent, as the locators claimed the San Xavier mine as discoverers, that they will be allowed to take twelve hundred feet along the line of the lode, in which event the monuments on the westerly end of the claim would have to be moved toward the east by a United States deputy surveyor, and the plat and field-notes amended accordingly, a resurvey of the premises not being necessary.

Should the applicants prefer, they have the option of making relocations under the act of May 10, 1872, in which case they will commence *de novo*, after filing notice of location with the proper local officer. The proceedings in that event will be the same as though no previous application for patent had been undertaken.

Should the claimants commence *de novo*, the surveyor-general can adopt the field-notes of survey already made, with the necessary amendments as to distances along the vein and corner monuments, thus saving the applicants the expense of a resurvey.

After the expiration of the sixty days' period of publication, should no adverse claim be filed, you will allow the claim to be entered, issuing the usual certificate and receipts of the current number and date. The duplicate receiver's receipt, of course, will not be issued until the one now in possession of the claimants is first delivered to the receiver; upon proper application the purchase-money already paid on the former entry (No. 3) will be refunded.

Hereafter in receiving applications for mining-patents, you will be particular to ascertain from the claimants:

First. Whether they claim right of possession under the local customs or rules of miners, as the same existed in the district, prior to the adoption of general mining regulations by the legislature of Arizona; and if so, require satisfactory proof that the claim is occupied in accordance with such customs or rules; certified copies of the regulations in force at the date of location to be transmitted with the case.

Second. Whether the application is for a claim located in pursuance of the general regulations adopted by the said legislature, (known as Chapter L of the Howell Code,) and, if such is the case, require satisfactory proof that the claimants have, in making their locations, complied with such regulations.

Third. If the claimants desire patent for a claim located in accordance with the act of Congress, approved July 26, 1866, you will observe that the location does not exceed two hundred feet on the course of the vein or lode for each person who is a party to such location, with two hundred additional feet for the discoverer, or three thousand feet for any association of persons; which three thousand feet can only be taken at the rate of two hundred feet to each individual comprising such association, two hundred additional feet being allowed the discoverer. By which it will be perceived that to locate three thousand feet on any vein or lode, required not less than fourteen persons where one was the discoverer, or fifteen persons if taken without reference to the discovery claim.

Fourth. If the application is for a mine located since May 10, 1872, the maximum along a vein or lode, that can be located by one person or several persons, is fifteen hundred feet, and three hundred feet on each side of the center of the vein at the surface is the greatest width of surface-ground permitted under the mining act of May 10, 1872.

FIRE CLAY.

*Commissioner Drummond to G. Billings, Salt Lake City, Utah, July* 10, 1873.

Lands valuable on account of deposits of fire clay may be patented, on compliance with the mining act of May 10, 1872.

THREE HUNDRED AND TWENTY-SEVEN ACRES OF PLACER-GROUND IN A SINGLE ENTRY.

*Commissioner Drummond to Register and Receiver, Fair Play, Colorado, July* 10, 1873.

Parties holding the possessory right, in accordance with the local laws, may make a single entry of three hundred and twenty-seven acres of placer-ground upon compliance with the mining act of May 10, 1872. [See Part IV.]

MINERALS DISCOVERED AFTER AGRICULTURAL PATENT HAS ISSUED.

*Commissioner Drummond to Cyrus Madden, Port Orford, Oregon, July* 10, 1873.

All mineral deposits discovered upon lands after United States patent therefor has issued to a party claiming under the laws regulating the disposal of agricultural lands, pass with the patent, and this office has no further jurisdiction in the premises.

TUNNEL OWNERS.

*Commissioner Drummond to L. S. David, Grass Valley, California, August* 1, 1873.

Locators of tunnels under the act of May 10, 1872, are required to use reasonable diligence in working and advancing their tunnels; otherwise such tunnel locations are treated as abandoned.

Section 4 of the mining act referred to reads as follows:

"But failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel."

There is no specified amount to be expended to retain the ownership of a tunnel location.

MINING-CLAIMS IN ALASKA.

*Commissioner Drummond to Gen. H. Clay Wood, Portland, Oregon, August* 2, 1873.

The territory of Alaska has not yet been organized into a surveying district, and therefore no applications for patents for mining-lands in that territory can be received or considered by this office.

INCORPORATED AND UNINCORPORATED ASSOCIATIONS.

*Commissioner Drummond to Register and Receiver, Carson City, Nevada, September* 11, 1873.

Where incorporated companies apply for patents for mining-claims, you will require a copy of their certificate of incorporation or charter to be filed with the application for patent.

Where an association of persons, unincorporated, apply for a patent, the published notice, the register's certificate of entry, and the receiver's receipt should give the names of all the applicants.

DATE OF LOCATION.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, September* 17, 1873.

The record evidence shows that the Dunkirk lode was not located until after the passage of the act of Congress of July 26, 1866, and record evidence cannot be disregarded in cases of this kind.

Where parties claim under a location made under the mining rules, their title cannot have an inception prior to date of a notice of location in which their names or those of their grantors appear.

The monuments will have to be removed from their present position by a United States deputy surveyor, and placed at the four corners of the one thousand feet claimed, and the plat and field-notes amended accordingly,

The applicant has failed to file any proof of improvements.

RELOCATIONS MUST BE MADE IN ACCORDANCE WITH LOCAL LAWS.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, September* 25, 1873.

In all cases where a party claims a lode which has been relocated, he should furnish proof that the relocation was made in accordance with the territorial law, and that he was entitled to relocate it.

DATE OF LOCATION—HOW DECIDED.

*Commissioner Drummond to Britton and Gray, Washington, D. C., October* 11, 1873.

The location of the Dunkirk lode is for 3,000 feet, which shows clearly that the location was intended to be made under the act of July 26, 1866, as no regulation or law, prior to that time, authorized the location of 3,000 feet for a mining-claim in Colorado.

The date of the location is September 3, 1867, in the record. This cannot be taken or considered as the date of filing, for two reasons, viz:

1st. This date is given by the locators themselves as the date of their location.

2nd. The filing of this notice with the proper recorder was on the 12th of September, 1867, as appears by the indorsement of the recorder thereon.

Parties are bound by the record which they make, and it has been the uniform rule of this office, at least since 1871, to confine them to the dates fixed by them in their notice and record of location.

PLACER-CLAIMS INCLUDING FIVE-ACRE LOTS.

*Commissioner Drummond to Register and Receiver, Sacramento, California, October* 23, 1873.

It is observed that said entry (of a placer-mine) embraces two five-acre lots.

The smallest legal subdivision of the public lands is a ten-acre tract, and it will, therefore, be necessary for Mr. Immer to have a survey made of the premises for which he has made application for patent.

SUIT DECIDED IN FAVOR OF APPLICANT.

*Commissioner Drummond to H. B. Morse, Central City, Colorado, October* 30, 1873.

If, as you state, the suit commenced against the applicant for patent has been decided in favor of the applicant, a copy of the decree of the court in the case should be filed with the register and receiver, with a certificate of the clerk of the court that no suit is pending against said applicant brought by the adverse claimant, bringing into question the title to said property.

COPIES OF CONVEYANCES OR AN ABSTRACT OF TITLE AND COPY OF LOCATION SHOULD BE FILED WITH AN ADVERSE CLAIM.

*Commissioner Drummond to Hempstead & Kirkpatrick, Salt Lake City, Utah, October* 31, 1873.

An adverse claimant to an application for patent for a mining-claim should file with the other papers which go to make up his adverse claim either an abstract of title to the premises claimed by him, together with a copy of the original notice of location, or certified copies of the original notice of location, and the deeds of conveyance tracing the right of possession from the original locators to such adverse claimant.

Where an abstract of title is furnished, instead of copies of the original deed; such abstract should be full and complete and properly attested by the seal of the recorder.

AFFIDAVITS OF POSTINGS.

*Commissioner Drummond to Register and Receiver, Central City, Colorado, Nov.* 4, 1873.

The applicant for patent for the Fingel lode, Griffith mining district, Colorado, informs this office that he is unable to furnish the affidavits of the parties who posted the notice and diagram upon said lode, one being dead and the other having left the district.

In view of the circumstances of this case you will receive the affidavits

of at least two credible persons in proof of such posting, who are cognizant of the facts.

IRON CLAIMS.

*Commissioner Drummond to Surveyor-General Reed, Cheyenne, Wyoming, November* 18, 1873.

Lands containing valuable deposits of iron can only be entered and patented under the mining acts of Congress. The proceedings to obtain patent for a vein or lode of quartz, or other rock in place, bearing iron, are the same as those required in cases of applications for patents for lodes or veins bearing gold, silver, copper, etc.

If the claim was located prior to May 10, 1872, the size of the claim, both as regards the length and width, is regulated by the local laws, customs, and rules. If the claim was discovered since May 10, 1872, the size of the claim is limited by the act bearing date the tenth May, 1872.

CERTIFICATE OF IMPROVEMENTS.

*Acting Commissioner Curtis to Register and Receiver, Fairplay, Colorado, November* 20, 1873.

Where a placer-claim is situate upon surveyed lands and conforms to legal subdivisions thereof, no survey or plat is required of the claim, and proof of improvements may consist of affidavits of parties who are familiar with the claim and who can testify understandingly in regard to the character and amount of improvements.

JENNY LIND *vs.* EUREKA.

In estimating the sixty days of publication, the first day of publication is excluded, and the last day included.

The jurat to the adverse claim must be made by the party, and cannot be made by an attorney.

Where several parties unite in an adverse claim, the jurat is sufficient if made by one of such persons.

The filing of an adverse claim with the register is a sufficient filing.

The adverse claim of the Jenny Lind does sufficiently set forth the nature of the claim.

If the adverse claimants properly allege that they are the owners of the claim, it is sufficient. The omission to file an abstract of title is an irregularity, and should not defeat an adverse claim.

*Secretary Delano to Commissioner Drummond, November* 24, 1873.

I have carefully examined the case of the Eureka Mining Company *vs.* The Jenny Lind Mining Company *et al.*, on appeal from your decision of the twenty-sixth day of March, 1873. I caused the same to be referred to the Assistant Attorney-General Smith for an expression of his views upon the questions involved, and have received from him two opinions, one of which is dated September 30th ult., and the other the twenty-second inst., copies of which you will find inclosed.

I concur with him in the conclusions at which he has arrived, and, in accordance therewith, hold:

First. That in estimating the sixty days of publication required by the act of May 10, 1872, the first day of publication should be excluded and the last included.

Second. That the jurat to the adverse claim, required by the seventh

section of said act, must be made by the party, and cannot be made by an attorney.

Third. That where several parties unite in an adverse claim, the jurat is sufficient if made by one of such persons.

Fourth. That the filing of an adverse claim with the register is a sufficient filing under the said act; and

Fifth. that the adverse claim of the Jenny Lind Mining Company does sufficiently set forth the "nature" of said claim.

I affirm so much of your decision as rejects the adverse claims of the May Henrietta lode, the Excelsior lode, and the King David lode; and reverse so much as rejects the adverse claim of the Jenny Lind Mining Company.

[Inclosure No. 1.]

*Assistant Attorney-General W. H. Smith to Secretary Delano, September* 30, 1873.

I have considered the appeal of the Jenny Lind Mining Company and others, adverse claimants, in the matter of the application of the Eureka Mining Company, for a patent for the Eureka and Montana lodes, situated in Tintic mining district, Juab county, Utah. The Eureka company filed their application on the twenty-first of August, 1872, under the act of May tenth, 1872, and on the twenty-fourth of August, 1872, the register gave notice of such application by publication in the *Weekly Tribune* of that date, which was continued for sixty days.

The Jenny Lind company, and the other adverse claimants now contesting, filed their adverse claims with the register of the proper land-office. These filings severally bear date October 22, 1872, at 11.30 o'clock p. m.

It is contended by the Eureka company, that as a matter of fact, said adverse claims were left with the register on the twenty-second of October, 1872, at 11.30 p. m., at his house, which was distant about a quarter of a mile from the land-office, and were not filed in the office of the register until the twenty-third of October, 1872, and that such filings in the office on the twenty-third were too late, the sixty days of publication having expired on the twenty-second. It is also contended by the Eureka company that the adverse claims of some of them were not prepared with the necessary formality, and did not contain proper plats of survey or abstracts of title, and were otherwise defective.

The Commissioner of the General Land Office held that the adverse claims were filed one day too late, and therefore he rejected them.

I shall first consider the question whether the filing was too late, upon the assumption that it was not made until the twenty-third October, 1872.

The sixth section of the act of May 10, 1872, (17 Stats., 93,) provides that an applicant for a patent for mineral lands shall file in the proper land-office an application under oath, with a plat, etc., and that "the register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim, and he shall also post such notice in his office for the same period."

The seventh section provides: "That where an adverse claim shall

have been filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of notice and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived."

From the foregoing express provisions of law, it appears that the time of publication is "for the period of sixty days," and that the adverse claim must be filed "during the period of publication," that is, during "the period of sixty days." When does this "period of sixty days" begin, and when terminate? Does it include or exclude the first day of publication? If it includes it, then, upon the assumption that the adverse claims were not filed until the twenty-third October, they were filed one day too late. On the other hand, if it excludes it, then the filings were in time.

The inquiry presented is one which has been a vexed question for centuries, and has been decided differently by the ablest courts in this country and in England. It has been appropriately termed the *controversia controversissima*, (Griffith *vs.* Bogert, 18 How., 162.) I shall not attempt to review the cases, for the reason that my official duties are such as not to allow the necessary time. I have carefully examined them, and, from such examination, am of opinion that the first day of publication should be excluded. When a computation of time is to commence from an act done, the day on which the act is done is to be excluded. In support of this view I cite the following authorities: 4 Kent, 103, (note,) 11 ed.; 2 Parson's Cont., 663, (note;) Pope *vs.* Headen, 5 Ala., 433; Lyon *vs.* Hunt, 11 Ala., 295; Lang *vs.* Phillips, 27 Ala., 311; Kim *vs.* Osgood, 19 Miss., 60; 25 Miss., 48; Bigelow *vs.* Wilson, 1 Pick., 485; State *vs.* Schwerle, 5 Pick., 279; Wiggins *vs.* Peters, 1 Met., 127; Farwell *vs.* Rogers, 4 Cush., 460; Weeks *vs.* Hull, 19 Conn., 376; Carleton *vs.* Bying, 16 Iowa, 588; Caruthers *vs.* Wheeler, 1 Oregon, 194; Judd *vs.* Fulton, 10 Bart., 117; Russell *vs.* Russell, 11 Bart., 96; Cornell *vs.* Moulton, 3 Denio, 12; Barr *vs.* Lewis, 6 Texas, 76; State *vs.* Gascon, 33 Miss., 102; Cann *vs.* Warner, 1 Houston, (Del.,) 88; Gorham *vs.* Wing, 10 Mich., 486; Sheets *vs.* Selden, 2 Wall., 177; Page *vs.* Weymouth, 47 Maine, 238; Walsh *vs.* Boyle, 30 Maryland, 262; Thorne *vs.* Mosher, New Jersey Eq., 257; Rex *vs.* Cumberland, 4 How. & M., 378; Gout *vs.* Edwards, 11 Sim., 434; Wilkinson *vs.* Gaston, 9 Queen's Bench, 141.

The cases also establish the proposition that when there is a doubt as to whether the day in which an act is done should be included or excluded, that construction should be adopted which will support a contract or deed, rather than that which would destroy it; that which will prevent a forfeiture, rather than that which would create one; and in cases of statutory enactment, that which will be most favorable to the party for whose benefit the statute was enacted.

In the case under consideration, the provision that there should be a publication of sixty days was made for the benefit of adverse claimants, and for the purpose of giving them an opportunity to assert their adverse claims; and in case of doubt as to whether the first day of publication should be included, or excluded, that doubt should, in my opinion, be decided in favor of the adverse claimants. I have proceeded thus

far upon the assumption that the adverse claims in the case now under consideration were not filed until the 23d October, and upon such assumption I think they were filed in time.

There is another view that may be taken of this case, which leads to the same conclusion. These adverse claims all bear an official indorsement that they were filed on the 22d October, 1872, at 11.30 p. m. Such indorsement is *prima facie* evidence that they were filed in the proper office at that date, and this legal presumption, if removed at all, must be removed by competent evidence. The only proof that has been offered to rebut this presumption and show that there was no filing in the land-office until the 23d October is an unsworn certificate of the register made in Washington city, on the 1st of March, 1873, in which he states that the adverse claims were left at his house at 11.30 p. m., October 22, and on the next day taken to the land-office, and marked filed as of the 22d, 11.30 p. m.

I am of opinion that this is incompetent evidence; that the official act of a sworn officer cannot be contradicted or explained by an unsworn statement like this, made long after the *res gestæ*.

I think the adverse claims were filed in time, and that the Commissioner erred in rejecting them on the ground that they were not so filed.

The Commissioner mentions the fact that some of the adverse claims were irregular, in not being accompanied with a plat of survey and field-notes. It is pretty satisfactorily shown in the evidence that the protestants made use of reasonable means to procure such survey and field-notes, and that they were prevented from so doing by the act of the Eureka company in obtaining control of the United States deputy surveyors, and thereby preventing them from making the survey for adverse claimants.

To allow that company to exclude the adverse claims for that reason would be to permit it to take advantage of its own wrongful act. The regulations issued by the Commissioner, it is true, require that there shall be such a plat and field-notes, but they do not have the force of law, and were never intended to operate as a bar where an applicant in good faith has done all that was in his power to comply with them.

And so with reference to the abstract of title. It is convenient to have such abstract for the purpose of showing how the claimant derives title, and therefore the adoption of the rule by the Commissioner.

If the adverse claimants properly allege that they are the owners of the claim, that is good pleading, and sufficient to notify the applicant for patent of what is claimed. I think an omission to file this abstract should be treated as an irregularity only, and not as a defect that vitiates the adverse claim. No one is injured by the omission, and it would be extremely technical to treat it as good cause for rejecting the claim.

I have now noticed all the objections mentioned by the Commissioner. Some others have been urged in the argument on appeal. It is objected that the affidavit to the adverse claim of the Jenny Lind company was made by W. J. Hooper, as president of the company, and that there is no sufficient evidence that he was president. It is claimed that the best evidence would be a certified copy from the record showing his election. Hooper states in the adverse claim that he is the president of the company, and swears to that statement. That is, I think, sufficient.

It is further objected that there is no sufficient evidence that W. M. Gillespie, before whom Hooper made the affidavit, was a notary public, or had authority to administer oaths. The certificate of Gillespie is under his official seal as notary public. That is sufficient evidence of his being notary, The power to administer oaths is given to notaries public in any State or Territory by the act of Congress of September 16, 1850, (9 Stat., 458.) It is also objected that one of the affidavits on file purports to have been made before a person as justice of the peace, and that there is no evidence that such person was a justice of the peace, except his own signature as such justice.

It is the constant practice in the land-office to receive and consider affidavits made before persons professing to act as justices of the peace, without other evidence of their authority; and it would take those who practice in that office by surprise to enforce the rule that such affidavits could not be considered without proof of the official character of the persons before whom they are taken and who profess to be justices of the peace. I think the objection altogether too technical, and that it should be overruled.

It is further objected that in certain of the adverse claims there is not sufficient evidence that suits have been brought on such claims, within thirty days from the time of filing them with the register.

It appears from the certificate of the clerk of the court that the persons who brought the suit, and are alleged to compose the unincorporated company, are not the persons who originally located the claim, and therefore it is said the company is not the one which filed the adverse claim.

Mining-claims are constantly changing owners. They are often assigned after location and before patent. The members who own the stock at the time suit is brought are the proper parties plaintiff, and it does not follow that the company is not the same because the stockholders are different. They allege that they compose the company, and that, I think, is sufficient.

They are not, and should not be, required to prove that they are the original locators, or that they are the identical persons who presented the adverse claim.

Some other objections are made, which present the question whether the adverse claimants are required to show affirmatively that they have complied with all the local usages and customs. I think they are not. If they have failed to comply with such usages, and a forfeiture is denounced for such failure, that is a matter of defense.

There is still another objection, of more gravity than some I have mentioned, and that is this: It is argued that all these adverse claims were improperly filed, because they were filed with the register only, when they should have been filed with the register and receiver.

The sixth section of the act requires that the application for patent shall be filed "in the proper land-office;" that the applicant shall post a notice of such application on the land, and file a copy of the notice "in such land-office;" that the register of the land-office "shall publish such notice for the period of sixty days," and post it "in his office" for the same period; that the claimant shall file "with the register" a certificate of the U. S. surveyor; that $500 worth of labor has been expended;

that at the expiration of the sixty days of publication the claimant shall "file his affidavit, (without saying where, but manifestly with the register,) showing that the plat and notice have been posted in a conspicuous place on the claim during the period of publication;" and then it proceeds that "if no adverse claim shall have been filed with the register and receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent," etc.

The Commissioner, in his regulations issued under this act, required that the adverse claim should be filed with the register, or, in his absence, with the receiver. Of course, the Commissioner cannot make the law, and if he has made a regulation that is in conflict with it, the regulation must fall.

Is there such a conflict? Did Congress intend that these claims should be filed with both officers, or that the adverse claim should be in duplicate? It was a fact well known to Congress, that the offices of register and receiver are kept together, and are one and the same office. This is almost universally the case. All the records of the office are in the custody of the register. The receiver has but little to do with them. He receives the money and gives a receipt therefor, and that is the main part of his duties. A filing in the office of the register, with him, is in substance a filing with the receiver. I cannot believe that Congress intended that the same document should be taken to the register and receiver and marked filed by each of them, or that two copies should be filed, one with the register and the other with the receiver. That would be to require a useless thing, which should never be presumed.

I prefer to hold that a filing with the register was a filing with the register and receiver, within the spirit and meaning of this act.

After the most careful consideration that I have been able to give this case, I am of opinion that the decision of the Commissioner was erroneous, and I advise that it be reversed.

[Inclosure No. 2.]

*Assistant Attorney-General Smith to Secretary Delano, Nov.* 22, 1873.

In the case of the Jenny Lind Mining Company and other adverse claimants against the Eureka Mining Company, before you on appeal from the decision of the Commissioner of the General Land Office, in accordance with your request, I had the honor to give my opinion upon the merits of the case on the thirtieth of September last. Since then other points have been made by counsel for the Eureka company, and at your like request I will proceed to state my views upon them.

The Eureka company objects to each of the following adverse claims, to wit: The May Henrietta lode, the Excelsior lode, and the King David lode, for the reasons that they were severally sworn to by D. Cooper as attorney, instead of by the persons, or some of them, who are alleged to be the owners thereof. The parties owning these lodes are unincorporated companies.

The seventh section of the act of May 10, 1872, provides: "That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same."

It does not provide that it may be upon the oath of an agent or attor-

ney. Without statutory authority, an attorney cannot make the oath for his client. I find myself obliged to advise that the above-named adverse claims were not properly verified, and for that reason should be rejected.

It is further objected by the Eureka company, that the protest and adverse claim of the Jenny Lind company was sworn to but by one, (W. G. Hooper,) where it should have been sworn to by all the persons composing the company.

In my opinion, the statute is complied with when any one of the persons asserting an adverse claim makes affidavit to the same. Such person is the representative of all.

It is well known that mining-claims are often owned by many persons living at a great distance from the mine. To require each owner to appear in the land-district where the mine is located, and make affidavit before an officer authorized to administer oaths in that district, (as must be done under the law,) and that, too, within the sixty days of publication, would be an unnecessarily harsh administration of the law, and would in many cases practically nullify the right of presenting an adverse claim. As in legal proceedings, one plaintiff or defendant may make jurat for his co-plaintiffs or defendants, so I think one adverse claimant may make it for all his co-claimants.

It is further objected by the Eureka company that the adverse claim of the Jenny Lind company is defective in this, that it alleges ownership by location of the south extension of the Bullion lode, the Queen Victoria lode, and the Pride of the West 2d lode, while the record of location shows that they were made by persons, some of whom were not members of the Jenny Lind company, and that there is no allegation or proof that such persons have ever assigned or conveyed their interest to the company, and therefore it is urged the adverse claim does not "show" its "nature" as required by the seventh section of the act.

I suppose that the provisions of law relating to adverse claims should receive a reasonable interpretation. They were made to be construed by local land officers, many of whom have never had a legal education, and they should be construed as men of good practical common sense would be expected to construe them. It was never intended by the law-makers that such a claim should be construed with the technical precision that a lawyer would be justified in applying to an indictment.

It was intended that the instrument should be so drafted as to inform a person of good sense that a portion of the mining-claim which he was seeking to obtain a patent for did not belong to him, but did belong to the protestant, and it was intended that this should be done with such precision as to fairly advise him of the "nature, boundaries, and extent" of the adverse claim, so that he might prepare himself to establish, on the trial before the courts, his own and defeat the adverse claim.

I think the adverse claim of the Jenny Lind company does furnish such information to the Eureka company. It gives the boundaries and extent of its claim with such precision that no objection is made on that account. The objection relates to the "nature" of the claim.

It alleges that it is the "lawful owner and entitled to the possession of about eleven hundred feet of the said Eureka lode;" that it "is the owner, by location of the persons composing said association, and in

possession of the following-named lodes or veins of quartz and other rock in place bearing silver and other metals, viz: the south extension of the Bullion lode, the Queen Victoria lode, and the Pride of the West 2d lode, situated, located, and recorded in the Tintic mining district, Juab county, Utah Territory;" that "on the seventeenth day of March, A. D. 1871, the several premises hereinafter described were mineral lands of the public domain, and each contained a vein or lode of quartz and other rock in place bearing and containing silver and other minerals, and said premises were entirely vacant and unoccupied, and were not owned, held, or claimed by any person or party as mining-claims or otherwise, and that while the same were so vacant, unoccupied, and unclaimed the persons (see Exhibit B) forming the association known as the Jenny Lind Mining Company, each and all being citizens of the United States at the time, did enter upon and explore and discover the south extension of the Bullion, containing three thousand (3,000) feet, linear measurement, which was located March 20 and recorded April 10, 1871, the Queen Victoria lode containing two thousand (2,000) feet, linear measurement, located March 17 and recorded March 18, 1871, and the Pride of the West 2d lode, containing sixteen hundred (1,600) feet, linear measurement, located June 21, 1871, and recorded September 19, 1871."

That "the said Jennie Lind company, and the persons composing the same, have continuously held and occupied and been in the actual possession of the mining premises and lodes since the date of location of the same, with the knowledge of the Eureka company and its agents, and without any opposition whatever from it" (Eureka company.) That "the locators of said lodes and the Jenny Lind Mining Company, respectively, have in all respects complied with every custom, rule, regulation, and requirement of the mining laws of said mining-district, and thereby became and are owners, (except as against the paramount title of the United States,) and the rightful possessors of said mining-claim and locations"; and that "the vice-president of the Eureka company, at the time of his filing the application therefor, well knew that the Jenny Lind Mining Company was the owner in possession and entitled to the possession of so much of said mining-ground embraced within the survey and plat of said applicant as is hereinbefore stated, and the said Jenny Lind Mining Company is entitled to all the silver and other metals in said southern extension of the Bullion lode, the Queen Victoria and the Pride of the West 2d lodes."

It further appears from the statements of said adverse claim that the Eureka company on the tenth day of October, 1872, entered into a written contract, which was proffered to the Jenny Lind company, but never executed by it, in which the Eureka offered to convey to the Jenny Lind, when patent should be issued to it, the said Bullion, Queen Victoria, and Pride of the West lodes, in consideration that the Jenny Lind company would refrain from filing an adverse claim to the application of the Eureka company for patent.

The said writing contains the following, (among other things:) "and whereas said party of the first part," (the Eureka company,) "has no claim to any part of said Queen Victoria, Pride of the West, and Bullion locations, their dips, angles, and spurs."

The above are the allegations of the adverse claim. I think they fairly inform the applicant for patent of its nature.

They state that the Jenny Lind company is the owner of said Bullion and other lodes by location. It is true that some of the exhibits show that the persons who organized the Jenny Lind company were not identical with some of the locators of said lodes. But what of that? Suppose the adverse claim had alleged ownership by location and the exhibits had shown ownership by purchase? The claim would, undoubtedly, have been good. The material thing is ownership, in accordance with the rules and regulations of miners. All that is alleged, and it is also alleged that the Eureka had full knowledge of the ownership and possession, and never asserted any claim to the contrary.

The statement in the written agreement goes further, and admits that said company had no claim to any part of the said lodes of the Jenny Lind company. It is claimed that this admission should not be regarded in the case, because it was made pending a treaty of compromise. Grant it; yet it is the admission of a fact made without any stipulation that it should be without prejudice, and, according to the American cases, is receivable as an admission against the Eureka Company. Mount *vs.* Bogart, Anthon, 190; Maney *vs.* Carter, 4 Conn., 635; Fuller *vs.* Hampton, 5 Conn., 416; Sanborn *vs.* Neilson, 4 N. H., 501; Delogey *vs.* Rentoul, 1 Martin, 175; Marvin *vs.* Richmond, 3 Den., 58; Cole *vs.* Cole, 34 Maine, 542.

Now, taking all these allegations as true, (which must be done in determining the sufficiency of this adverse claim,) and I do not see how it can be claimed that the Eureka company is not sufficiently informed of the nature of the claim. I think it was so informed, and I advise that so much of the Commissioner's decision as rejected the Jenny Lind Mining Company's adverse claim be reversed, and so much as rejected the other adverse claims be affirmed.

EXPENDITURE THAT SHOULD BE SHOWN UPON THE PLAT AND FIELD-NOTES OF SURVEY.

Where a mill-site is applied for, in connection with a lode-claim, the $500 expenditure is not required to be upon the mill-site, but upon the lode-claim only.

The $500 expenditure must be shown upon the plat and field-notes of each of the four classes of claims contemplated by the mining statutes.

*Commissioner Drummond to Surveyor-General Lessig, Denver, Colorado, March* 10, 1874.

The 15th section of the mining act of May 10, 1872, provides "that where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notices as are applicable under this act to veins or lodes."

If, therefore, a party who has improved, held, and worked his mine in accordance with the local law and Congressional enactments, and who has expended in actual labor and improvements thereon an amount of not less than five hundred dollars, desires to include in his application for patent therefor "non-mineral land not contiguous to the vein or lode

which is used or occupied by the proprietor of such vein or lode for mining or milling purposes," it will only be necessary for such applicant to furnish evidence that five hundred dollars have been expended upon the lode-claim.

In other words, where a party applies for a lode-claim and mill-site in the same application, the act does not require that five hundred dollars shall have been expended upon the mill-site, but upon the lode-claim only.

The mining act of May 10, 1872, provides for patenting, 1st, lode-claims; 2d, placer-claims; 3d, mill-sites, and 4th, lode-claims and mill-sites; and the plat and field-notes of survey of either of these classes of claims should show that an amount of not less than five hundred dollars have been expended upon the claim in actual labor and improvements.

ANNUAL EXPENDITURES ARE NOT REQUIRED UPON PLACER-CLAIMS.

*Acting Commissioner Curtis to R. B. Patton, Sweetland, California, April* 25, 1874.

The only reference made to the subject of annual expenditures upon mining-claims is found in said 5th section, (R. S. 2324,) which provides that on each claim located since May 10, 1872, one hundred dollars shall be annually expended, and on all claims located prior to said date, ten dollars' worth of labor shall be performed or improvements made each year *for each one hundred feet in length along the vein.*

The 10th section of said act of May 10, 1872, (R. S. 2331,) provides that the act of July 9, 1870, "shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode-claims."

The 10th section, taken in connection with the 5th section of the act of May 10, 1872, makes it clear to my mind that it was the intention of Congress to require annual expenditures only upon vein or lode-claims, leaving placer-claims, as they had been previous to the passage of said act, subject to the operation of the local laws, rules, regulations, and customs.

BELLWETHER LODE.

A protest to be considered must be sworn to before an officer authorized to administer oaths in the land-district where the claim is situated.

Contestants, notwithstanding default in making protest, may be considered as parties to the contest for the purpose of showing from the record that the claimants have not complied with the requirements of the law.

The publication of notices in mining cases may be in newspapers published weekly, but must cover the full period of sixty days. A publication in a weekly paper for nine successive weeks (nine insertions) is not a publication "for the period of sixty days."

*Secretary Delano to Commissioner Drummond, April* 30, 1874.

I have considered the appeal of John H. McMurdy *et al.*, adverse claimants, from your decision of October 29, 1873, in the matter of the application of Eli S. Streeter and Thomas McCunniff for patent to six hundred linear feet of the Bellwether lode, Central City land-district, Colorado.

You dismissed the adverse claim of McMurdy *et al.* on the ground

that the protest filed was not sworn to before an officer authorized to administer oaths in the land-district where the claim is situated, following herein the rule laid down in the recent case of the Dardanelles Mining Company *vs.* The California Silver Mining Company, decided by the Department October 28, 1873. Your decision is to this extent correct, and is hereby affirmed.

It is asserted, however, upon appeal, that the claimants have not complied with the requirements of the act of May 10, 1872, in the prosecution of their claim, and that, notwithstanding their (contestants') default, they are entitled to show such non-compliance, and thereby defeat the claim of the applicants for a patent under the present proceedings.

The right here contended for is expressly given by the last clause of the sixth section of the act of May 10, 1872, (under which act all the proceedings in this case were instituted,) which is in the following words, viz: "And thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act."

The contestants are, therefore, to be considered as parties to the contest for the purpose of showing from the record that the claimants have not complied with the requirements of the act.

For the purposes of this case it is only necessary to notice one of the objections raised by the appellants, viz., that the publication of the notice of application was not made in compliance with the terms of the act.

The publication was made in a weekly paper, *The Colorado Miner*, for nine successive weeks, nine insertions, the first being in the issue dated February 6, 1873, and the last in the issue dated April 3, 1873. Was this a publication "for the period of sixty days?" I think not. The language of the act is plain. "The register of the land-office * * * * * shall publish a notice that such application has been made *for the period of sixty days* in a newspaper to be by him designated," etc. It does not direct a publication once a week for eight weeks, or two months, but for a certain period, viz., sixty days. The publication may undoubtedly be made in a paper published weekly, but it must cover the full period named. The time elapsing between the first and the last insertions must include the full period of sixty days. From the 6th of February, 1873, to the 3d day of April, 1873, including the first day of publication, (which I think should be excluded,) there were only fifty-seven days, viz., in February twenty-three, in March thirty-one, and in April three—total, fifty-seven. This was clearly not a publication "for the period of sixty days."

The statute having in this material requirement been disregarded, the publication as made, and all subsequent proceedings founded upon it, were irregular and invalid.

IRON CLAIMS.

*Acting Commissioner Curtis to Andrew I. Stewart, Salt Lake City, Utah, May 2, 1874.*

Iron lands may be patented under the mining acts of Congress. Where the iron is found in lodes or veins, or in rock in place, the proceedings to obtain patent are the same as those prescribed in the mining act of May 10, 1872, in case of vein or lode-claims.

Where the iron is not found in rock in place, the proceedings to obtain Government title are the same as those prescribed by said act in case of placer-claims.

CASCADE LODE.

Application for patent rejected, because—

1. The notice was published without the knowledge of the register.
2. The notice was not published in a newspaper designated as published nearest the claim.
3. The record title was found defective; and
4. A previous application had been made for the same premises, which was withdrawn pending a suit in court commenced by the adverse claimant.

*Acting Commissioner Curtis to Register and Receiver, Central City, Colorado, May* 7, 1874.

I have carefully examined the papers in the case of the application of J. B. Lewis for patent for fourteen hundred linear feet of the Cascade lode, Cascade mining district, Clear Creek county, Colorado.

This application was filed in the local office on the 20th March, 1873, and the notice published in the *Daily Colorado Herald* on the same day, and thereafter for the period of sixty days.

The mining act of May 10, 1872, provides for the patenting of mining-claims, and clearly sets forth the manner of proceeding to obtain Government title.

One of the conditions precedent to obtaining patent for a mining-claim is, that "the *register* of the land-office * * * shall publish a notice that such application has been made for the period of sixty days in a newspaper, to be by him designated as *published nearest to said claim.*"

In the case under consideration it appears by the sworn statement of S. P. Lathrop, who was register of the Central City land-office at the date of the filing of said application, "that on the 2d day of March, 1873, during his absence from said office, John B. Lewis filed in said office an application for patent for the Cascade lode, situated in Cascade mining district, Clear Creek county, Colorado Territory; that without the knowledge and authority of affiant, the receiver of said land-office caused a notice of said application to be published in the *Colorado Herald* instead of the *Georgetown Miner*, in which, to the best of my knowledge and belief, it should have been published."

By the affidavit of Francis F. Bruné, deputy mineral surveyor for said district, it appears that the premises described in the application for patent are about four miles from Georgetown, and about twelve miles from Central City.

From the foregoing it will be seen that the notice was not published in accordance with the law, having been published *without the knowledge of the register, and not in a paper published nearest the claim.*

The register has been accustomed to publish the notices of applications for patents for mining-claims situate in Cascade district, Clear Creek county, in the *Colorado Miner*, which is published near to said district, and within the county, and parties owning claims in that district had a right to expect that notices of intentions to apply for patents for mines in said district would be published in the *Colorado Miner*, and not in a paper published in another county and at a much greater distance.

The application for patent describes fourteen hundred feet of the Cascade lode. The abstract of title shows that the original locators of said lode conveyed their respective interests to James G. Thorn.

It appears that there is a defect in the deed from Thorn to Moses M. Fuga, the grantor of the applicant for patent, and the original deed from said Thorn to J. Warren Brown—on file with the case—conveys to the said Brown 1,500 feet of the said Cascade lode, "being the same property claimed fraudulently by M. M. Fuga and his grantees, a deed of which property the said Fuga obtained from the said first party (James G. Thorn) by fraud, which said deed was never acknowledged by the said party of the first part."

In addition to all these irregularities, it appears by the papers in the case that Mr. Lewis made application for patent for his claim on said Cascade lode on the 8th of April, 1872, and that an adverse claim was filed against the same by J. Warren Brown within the time prescribed by law, and suit commenced thereon, and that while said suit was pending, Mr. Lewis withdrew said application and commenced a new application, as hereinbefore recited.

In view of these facts Mr. Lewis could not receive a patent upon his present application, even though no adverse claim had been asserted.

The application of Mr. Lewis is hereby rejected.

### NORTHERN LIGHT AND FAIRVIEW MINES.

**Publication of notice in mining applications must be made in only one newspaper for the period of sixty days.**

*Commissioner Burdett to Register and Receiver, Salt Lake City, Utah, June* 16, 1874.

The notices in case of the applications for patents for the Northern Light and Fairview mines, Utah, were published in the *Endowment* newspaper one day, in the *Evening Journal* forty-one days, the Bingham Cañon *Pioneer* seventeen days, and in the Salt Lake *Herald* fifteen days, for the reason that the three first-named newspapers suspended after the said notices had been published therein for the respective periods of time named.

This cannot be considered a publication within the meaning of the mining act. The notice should be published for the period of time required by law in one newspaper.

### JEFFERSON *vs.* PENNSYLVANIA.

*Commissioner Burdett to Register and Receiver, Marysville, California, July* 21, 1874.

When papers have once been filed with you, they become a part of the record, and can neither be withdrawn nor returned, but must be transmitted to this office with the other papers in the case.

If a party files an adverse claim to an application for patent, and for any reason concludes not to prosecute the same, he may file with you a written statement of the fact that he does not intend to longer contest the right of the applicant, in which event all the papers filed by the applicant and the adverse claimant will be transmitted to this office when the entry has been made.

SECOND SUIT.

*Commissioner Burdett to Register and Receiver, Helena, Montana, July* 24, 1874.

(In case of Wood *vs.* Hyde.)

On the 22d day of November, 1873, in open court, the said adverse claimants "entered their discontinuance of their suit herein, whereupon said court rendered judgment against the said plaintiff for costs."

It appears that the said adverse claimants commenced a second suit against said applicants on the 28th November, 1873, bringing into controversy the right of possession to a portion of the premises described in said application for patent. No suit is now pending which was commenced within the time allowed by said decision of April 5, 1872.

The only suit now pending was commenced more than eighteen months after the said decision was rendered, and the case will be taken up for final action in its regular order as though no adverse claim had been filed.

SEVEN-THIRTY LODE.

The examination of an application for patent under the mining laws should proceed beyond the papers filed in the case and into those general records of the General Land Office which evidence the final disposition made of the public domain; and if it is found that any part of the premises applied for have been previously disposed of, an express exception thereof should be inserted in the subsequent patent.

*Commissioner Burdett to Britton, Gray & Drummond, Washington, D. C., August* 17, 1874.

On the 4th instant a decision was rendered by this office in the matter of the application of Samuel Watson *et al.* for patent for the Seven-Thirty lode, Colorado, in which occurs the following recital: That "it is also shown that the Hercules lode does not follow the surface-ground patented to said company throughout its entire length, but that it leaves the surface near the southwesterly end of the survey of the surface-ground, and underlies a portion of survey No. 136."

It is then held as follows: "The United States having conveyed to said company the entire surface-ground embraced by said survey No. 112, and 3,000 linear feet of the Hercules lode, in accordance with the provisions of the mining act of July 26, 1866, a clause will be inserted in the patent to said Watson *et al.* for said claim when issued, excepting from the conveyance the surface-ground and lode conveyed to said International Mining and Exchange Company by said patent, dated September 3, 1872."

On the 7th instant you filed in this office a "protest" against said decision, quoting and particularly objecting to the following sentences of the before-mentioned recital, viz: "It is also shown that the Hercules lode does not follow the surface-ground patented to said company throughout its entire length, but that it leaves the surface-ground near the southwesterly end of the survey of the surface-ground, and underlies a portion of survey No. 136."

Your protest is also understood by its general terms to be directed against the proposed insertion in the patent to the Seven-thirty lode of a clause excepting from the conveyance the surface-ground and lode conveyed to the said company by patent dated September 3, 1872. * * *

The decision of the 4th instant, against which your protest is made, embraces as findings or official conclusions in the nature of a final judgment of the office—

1st. That the applicants have shown compliance with the law, and are entitled to receive a patent; and,

2d. That such patent shall issue, but with an excepting clause as to certain surface-ground and lode theretofore conveyed by patent to other parties.

Nothing more than this, which is so in the nature of an adjudication as that it might be held restrictive of or so definitive of rights as to be binding on either parties or privies, is found or intended to be embraced by the recitals of said letter.

The particular recital embraced and quoted in your protest is in the nature of inducement or introduction only to the specific findings that *exception shall be made in the patent.*

The real question involved, therefore, is: Is it the duty of this office, upon the record as it stands, to insert or to omit the exception complained of, and as preliminary thereto what proofs, proceedings, and records should be considered in reaching a conclusion upon that question?

*It is conceded* that a protest has no such office to perform as that, upon its being filed, any right of intervention accrues save only in the nature of a challenge of the applicant's own showing, or that through its instrumentality any trial of unascertained rights may be authorized.

It is held that, for ascertaining the proper and necessary recitals of a patent in a given case, the applicant is bound by the terms and disclosures of such filings as conformably with the law he rests his right to enter and purchase upon; and that, for the further ascertainment and protection of rights, and as a duty on the part of the United States, it is held that the examination of this office should, whether protest be filed or not, proceed beyond the papers filed by the applicant, and into those general records of the office which evidence the final disposition made of the public domain; and if upon examination it is found that any part of the premises applied for have been previously disposed of, that express exception thereof should be inserted in the subsequent patent.

Upon this theory the examination proceeded in this case.

It is found, among other things, upon inspection of the official plat of survey furnished and filed by the applicants for patent for the Seven-thirty lode, as well as the diagram posted with the notice on the claim, that said claim, designated lot No. 136, and known as the Seven-thirty lode, does, at its southwesterly end, embrace a portion of the *surface-ground* embraced by said survey No. 112, patented to the International Mining and Exchange Company with their claim on the Hercules lode, and that it also covers a part of the *Hercules lode.*

By reference to the record of patents in this office, it is found that a patent issued on the 3d day of September, 1872, to the International Mining and Exchange Company, for the premises embraced by said survey No. 112, and for three thousand linear feet of the said Hercules lode.

A comparison of said patent and the plat of said survey No. 112, incorporated into and made a part of said patent, with the plat of survey No. 136, confirms the admitted interference of survey No. 136 with the surface-ground and lode patented to said company with survey No. 112.

In other words, the Seven-thirty applicants ask the United States to sell and convey to them, as a portion of the public domain, a tract of land and certain premises already sold and conveyed. This I decline to do, and hold that in such cases it is the duty of this office to protect the prior patentee by inserting in the subsequent patent such apt words as shall clearly except every right already conveyed.

What is granted by the United States to the patentee of a vein or lode-claim may be thus stated. A patent granted for a mining-claim under the act of July 26, 1866, by the express provision of the act, conveys to the grantee therein named the *surface-ground* embraced within the exterior boundaries of the survey, and the *particular lode* named in the patent for the number of feet patented along the course thereof, with all its dips, angles, and variations, although it may depart from the surface-ground described in the survey, and enter the land adjoining.

Where the application for patent was pending under the act of 1866, on the 10th day of May, 1872, none of the rights which the applicant had acquired by virtue of compliance with said act of 1866 were affected or impaired in any way, and patents issued upon applications of this class convey the same rights which were conveyed under the act of 1866, together with all other veins or lodes, the tops or apexes of which lie inside the exterior boundaries of the surface-ground patented, to the extent and in the manner provided by the third section of the act of May 10, 1872.

This question is fully discussed in two opinions rendered by this office in regard to this same Hercules lode, of date December 26, 1872, one addressed to Hon. J. B. Belford and the other to L. G. Calkins, Esq.

Conformably with those views, it has been the constant and uniform practice and custom of this office in the recitations of its mineral patents to expressly convey the lode or vein named in the patent to the number of feet named, as well as the surface-ground described in the patent, and it is deemed proper and just in forming an exception to make it equally broad.

That you may be fully informed upon the matter, it is now decided that the form of exception to be inserted in the patent to Samuel Watson *et al.*, when the same shall issue, will be in the following words, viz., "excepting from this conveyance the surface-ground and lode conveyed to the said International Mining and Exchange Company by said patent, dated September 3, A. D. 1872."

*Secretary Delano to Commissioner Burdett, March* 4, 1875.

The survey of the Seven-thirty claim shows a partial conflict as to surface-ground with the patented claim of the International Mining and Exchange Company, (Hercules lode,) and you find from the record and the files of your office, as a matter of fact, that the said Hercules lode leaves the surface-ground patented to said company and extends under the surface-ground of the Seven-thirty claim. You accordingly directed that a patent issue to the claimants in conformity to their survey, with a reservation excepting that portion of the surface-ground in conflict, and excepting also the lode already patented to said International company.

Appeal has been taken from this decision, and the exception mainly relied upon is your direction that, in the patent to be issued to the Seven-thirty, the lode patented to the International company shall be reserved.

The second section of the act of July 26, 1866, under which the International made its location, authorizes the patentee to follow the vein or lode, "although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." This provision certainly makes it proper to recite the "condition" in the patent for the "land adjoining," whether it is absolutely necessary to make such recital or not. It may be that the law would sufficiently protect the patentee without any such recital; but I think it can do no harm to insert it, and that the Land Office may properly make the insertion whenever it is shown, by its own records, that there has been a previous patent for a mineral lode on land adjoining that applied for.

You directed that the exception should be in these words: "Excepting from this conveyance the surface-ground and lode conveyed to the said International Mining and Exchange Company by said patent, dated September 3, A. D. 1872."

It is objected to this form of expression that it finds that the lode referred to does run under the premises of the Seven-thirty, and that you have no right to find such a fact.

I am of opinion that the rights of all parties will be protected by inserting in the patent to the Seven-thirty the following clause, which is hereby directed to be done, to wit: "Excepting from this conveyance the surface-ground conveyed to the said International Mining and Exchange Company by its patent, dated September 3, 1872, and also excepting from this conveyance so much of the Hercules lode, if any there be, as was legally conveyed to the said International Mining and Exchange Company by its aforesaid patent."

To this extent I modify your decision.

COMPROMISE.

*Commissioner Burdett to Hayden & Gilchrist, Washington, D. C., August* 18, 1874.

In cases where two applications for patents under the mining acts conflict with each other, and the applicants may desire to compromise or amicably settle their disputes by each party releasing to the other a portion of the premises embraced in the respective applications, a survey will be required of that portion of each claim which may be necessary to show the compromise line agreed upon between the parties, and the exterior boundaries of each claim to be patented.

It is wholly unnecessary for this office to direct the surveyor-general to make such resurveys in cases of this kind, as he will promptly do so upon application being made to him by the parties in interest.

SILVER ORE LODE.

A lode located under the act passed by the Colorado legislature, Feb. 9, 1866, was located prior to July 26, 1866, if discovered prior thereto and the local laws were fully complied with, notwithstanding the record thereof was not made until subsequent to the passage of the act of Congress of July 26, 1866.

*Acting Secretary Smith to Commissioner Burdett, August* 26, 1874.

I have examined the case of Wm. A. Hamill, on appeal from your

decision of September 14, 1873, in the matter of his application for patent to the "Silver Ore lode," Griffith mining district, Colorado Territory, under the act of July 26, 1866.

His claim is for fourteen hundred feet of said lode, seven hundred feet upon each side of the discovery-shaft, as shown by the survey accompanying the record.

You find, as a matter of fact, that the claim of Hamill's grantor was recorded in the proper recorder's office subsequently to the passage of the act of 1866, which expressly limits the quantity to be entered under future locations to two hundred feet in length along the vein to each locator, with one additional claim for discovery to the discoverer of the lode; and you held substantially that this date of record should be considered as the date of location, and that the claim should consequently be restricted to four hundred linear feet. From this decision appeal has been taken to the Department.

The proviso to the 4th section of the act of 1866 limits "locations" *thereafter* made to two hundred feet for each locator, with an additional claim for discovery. By logical and legal inference, therefore, locations *theretofore* made are not to be so limited. They are to be governed, by virtue of the preceding sections of the act, by the local laws, customs, and rules of the mining-districts where the claims are situated, subject only to the general limitation to three thousand feet, in compliance with the second proviso to the 4th section. When such rules differ with the provisions of the first proviso relating to quantity, they are not "in conflict" therewith, so far as prior locations are concerned, for the limitation by the proviso refers specifically to locations *thereafter made.* Neither is the view of law here taken contrary to what may reasonably be presumed to have been the intent of Congress. The act of 1866 was the first mining statute of general application ever passed by Congress. Prior to that date, as a matter of general notoriety and history, in all the mineral regions miners held possessory rights by "locations" under local laws. These rights were always locally respected by the citizens and the courts. Congress, by the act of 1866, attempted to establish a general rule by which these local rights should be recognized by the Government, so far as not in conflict with the laws of the United States. It, for this purpose, recognized these local laws, customs, and usages, and with reference to the quantity of any lode to be entered, applied two limitations, viz: a general one of all claimants to three thousand feet, and with reference to a certain *specified class of locations*, those made "*thereafter*," a further limitation to two hundred feet and an additional claim for discovery. The intent was to recognize all locations in accordance with existing law, subject to these limitations. I can see no good reason why Congress should not be presumed to have intended just what is enacted. A claimant who had located a claim prior to this act, and had complied with the local laws, was certainly equitably entitled. Congress intended to embrace such claims; it did so by the general language of the preceding section, and it did not limit them by the first proviso of the 4th section. By what, then, are they limited? They are valid under local laws unless in conflict with the laws of the United States. They were not so in conflict prior to the act of 1866, and they are not now in conflict unless by the proviso in question.

This proviso, as I have already stated, applied by intent of Congress, and by the effect of the language used to future locations.

I am of opinion that locations made prior to the act of 1866, and in full compliance with local law at that date, were valid under the act for the quantity authorized by local law, subject to the general limitation to three thousand feet.

Was the Silver Ore lode located prior to the act of 1866?

The revised statutes of the Territory of Colorado, (January 10, 1868, Chap. LXXII,) provide, with reference to all rights of occupancy, possession, and enjoyment of public lands, that all such rights acquired after the 7th day of November, 1861, shall be ascertained, adjudged, and determined by the laws of the Territory in force at the date of such acquisition.

The first and second sections of a statute of the Territorial legislature approved February 9, 1866, are in the following words, viz:

"SECTION 1. That hereafter each and every person who shall discover any mineral lode or vein of gold-bearing ore, or of silver, or other valuable metals in this Territory, shall, *by virtue of such discovery*, be entitled to take, hold, and possess fourteen hundred feet, linear measure, of such lode or vein, of which the discovery-shaft shall be the centre thereof; and said fourteen hundred feet, so taken, shall be known and described as the discovery-claim.

"SECTION 2. All lodes or veins of gold, silver, or other valuable minerals, which may hereafter be discovered, shall be marked at the point of discovery by a substantial stake, post, or stone monument, having inscribed thereon the name of the discoverer or discoverers and the name of the lode or vein, with date of discovery; and the discoverer or discoverers shall, *before recording*, excavate thereon a shaft at least ten feet deep, or deeper if necessary, to find a well-defined crevice, or forfeit all right and title he or they may have acquired by virtue of such discovery."

Thus stood the local law of the Griffith mining district from and after the 9th day of February, 1866.

The facts in the case under consideration as shown by the record are as follows, viz:

In the latter part of May, or the first part of June, 1866, one Thomas A. Higginbotham discovered the Silver Ore lode, and by virtue of said discovery, and under the provisions of the Territorial act above quoted, took possession of the same. During the said months of May and June, and subsequently, he kept in position at the discovery-shaft of said lode a good and substantial stake, having inscribed thereon his name as discoverer, the name of the lode, the date of discovery, and the number of feet claimed. He recorded his claim, as above set forth, in the proper office on the 3d day of November, 1866, prior to which time he had sunk a shaft over ten feet deep, finding a well-defined crevice from the surface of the earth to the bottom of the shaft. During the months of May and June, 1866, he had a well-defined crevice in his discovery-shaft. On the 27th day of August, 1869, he sold the premises to the present claimant. Over one thousand dollars have been expended upon the lode, and there are no opposing claims.

In my opinion this claim, within the meaning of the proviso, was *located* prior to the act of 1866. Higginbotham discovered a lode; by virtue of

such discovery, and in accordance with the local laws, he took possession of it. He posted the proper notice, and, so far as he had gone, otherwise fully complied with the Territorial act. His claim was not recorded until after the act of 1866, but the Territorial act required that certain labor necessarily requiring considerable time should be performed prior to recording, viz., that a shaft should be sunk at a depth of at least ten feet. By local laws Higginbotham had a good and valid claim, so far as he had progressed at the date of the act of 1866. He had an unrecorded location, one that was probably not susceptible of being recorded at that date. Within reasonable time thereafter, and when he had performed the work required, he recorded his location. I am unable to see wherein he failed in any particular to comply with the Territorial act, or wherein his claim under local law was defective. The recording was only one of several requirements, and the last one of a series. His claim was located when he initiated these proceedings in the manner prescribed, and continued to be a location as long as he complied with the requirements of the Territorial act.

I think you erred in holding the date of record in this case to be conclusive of the date of location, and I am of the opinion that the location, within the meaning of the proviso, was prior to the act of 1866.

SURVEY OF ADVERSE CLAIM.

*Acting Secretary Cowen to Commissioner Burdett, September* 9, 1874.

There is a diagram, marked "B," found among the papers, containing the survey of the Homestead and Daniel Webster lodes, with a portion of said lodes colored yellow and marked "Eureka;" but it bears physical evidence that it was never attached to the protest. It is probably the paper intended to be referred to as Exhibit B, but, strictly, is no part of the protest.

Treating it as the exhibit referred to—and it does not show upon its face how much of the 800 feet claimed for the Eureka is taken from the Homestead or Daniel Webster—and yet it is the most definite description of any part of the protestants' claim, and is the very thing relied upon to excuse them from filing a survey and plat as required by the regulations, and is the exhibit which, as they allege, shows the "boundaries" and "extent" of their adverse claim.

The rule that a survey must be made of the entire adverse claim is a wise one, for it may appear from such survey that what is asserted to be an adverse claim is not one in fact and law. To allow a protestant to color a portion of the applicant's survey and treat it as his entire adverse claim, would be a very loose way of doing business, and would operate perniciously in practice and encourage parties in setting up unfounded claims. I think it should not be encouraged or permitted.

DEPOSITS OF SLATE.

*Acting Commissioner Curtis to Register and Receiver, Stockton, Cal., Oct.* 23, 1874.

You state that valuable deposits of roofing-slate have been discovered upon said tract, and that said applicants have expended quite a large amount in the development thereof.

You will allow said applicants to proceed with their application, and

upon full compliance with the [mining] law and instructions, enter and pay for their claim.

ADVERSE CLAIM OF INCORPORATED COMPANY; HOW SWORN TO.

*Acting Commissioner Curtis to Register and Receiver, Central City, Colorado, October* 26, 1874.

(In case of the Marshall Silver Mining Company, of Georgetown, on the Reynolds lode.)

The attorney for the applicant filed with you a request to disregard the adverse claim, as the same had been sworn to by John Turck, as agent and attorney for said Equator Mining and Smelting Company.

In support of his request he cites the decision of the Honorable Secretary of the Interior, in the case of the Jenny Lind Mining Company *et al. vs.* The Eureka Mining Company. All of the adverse claimants to the application of the Eureka Mining Company for patent were unincorporated companies or associations.

In the case under consideration the adverse claimant is an incorporated company.

An incorporated company must necessarily act through its officers or agents. The company, as a company, cannot make oath to the statements contained in an adverse claim presented by it.

This adverse claim having been filed in due time and in proper form, the proceedings upon said application will be stayed.

CENTRAL PACIFIC RAILROAD COMPANY *vs.* MAMMOTH BLUE GRAVEL COMPANY.

Mineral lands do not pass to the Central Pacific Railroad Company by virtue of its grant, but the timber upon the mineral land within the ten-mile limits is granted to the road, except so much of it as is necessary to support the improvements of mine owners thereon.

*Commissioner Burdett to Register and Receiver, Sacramento, California, November* 12, 1874.

This mining-claim is situated in a well-known mineral region and within the mineral belt, and could not fall within the provisions of the tenth and eleventh sections of the mining act of July 26, 1866, being neither "properly" nor "clearly agricultural land."

Said tracts are, therefore, adjudged *mineral* in character, and will be treated accordingly.

The evidence shows that much valuable timber is growing upon said tracts, and the question is submitted whether such timber was granted to the Central Pacific Railroad Company as is found upon odd sections by virtue of the grant to said railroad company.

The act of Congress, approved July, 1862, (12 Stat., 489,) entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," grants to said railroad company every alternate section of public land within the limits of ten miles on each side of said road, "provided that all mineral lands shall be excepted from the operation of this act, but where the same shall contain timber the timber thereon is hereby granted to said company." (*Vide* sec. 3.)

This act was amended by act approved July 2, 1864. (13 Stat., 356.)

The 4th section of said amendatory act extends the limits of said grant to the distance of twenty miles on each side of the road, and provides that "any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler on any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner or agriculturist." * * * That the phrase, "but where the same shall contain timber the timber thereon is hereby granted to said company in the proviso to said section three, shall not apply to the timber growing or being on any land further than ten miles from the centre line of any one of said roads or branches mentioned in said act or in this act."

From the foregoing it will be seen that mineral lands do not pass to said railroad by virtue of its grant, but that the timber being or growing upon mineral land within ten miles of the centre line of said road or branches is granted to said railroad company, excepting so much as is *necessary to support the improvements* of mine owners upon the given tracts.

And when patent issues for such mineral land it will be necessary to insert therein a clause excepting from the operation of the patent to said applicant all timber being or *growing upon odd-numbered sections within the limits hereinbefore referred to, except* such as is "necessary to support his said improvement as a miner," as provided in said statute.

PLACER-CLAIMS.

*Commissioner Burdett to Hon. H. F. Page, House of Representatives, November* 21, 1874.

The size of placer-claims located prior to the act of July 9, 1870, is regulated and controlled by the local law. Subsequent to July 9, 1870, and prior to May 10, 1872, no location of a placer-claim can exceed one hundred and sixty acres.

From and after the passage of the mining act of May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association can exceed one hundred and sixty acres.

There is nothing in the mining acts of Congress forbidding one person, or an association of persons, purchasing as many *separate and distinct locations* as he or they may desire, and embracing in one application for patent the entire claim to which they have the possession and the right of possession by virtue of compliance with the local laws and Congressional enactments.

The law does not require an expenditure of five hundred dollars upon each *location* of a placer-claim embraced in an application for patent where the locations are contiguous and constitute one claim.

Where an application embraces two or more separate and distinct tracts of placer-mining ground, the required amount, viz., five hundred dollars, should be expended upon each tract, and a copy of the diagram and notice posted upon each tract, to entitle the claimant to make entry thereof. [See Part IV.]

SHOO FLY, MAGNOLIA, AND OTHERS *vs.* MONO.

Where parties show that they were not discoverers, only 200 feet to each locator could be taken under the act of July 26, 1866.

Locations made under the act of May 10, 1872, must be accurately described.

In the matter of citizenship, the mining law is complied with if citizenship be properly alleged and the fact be not controverted.

Where suit is commenced after the filing of an application for patent by a party who subsequently filed an adverse claim in regular form, the application will remain suspended until the case is decided in court or otherwise settled.

A stipulation wherein it is set forth that "the said action, by consent of the parties thereto, is hereby dismissed; the clerk of said court is hereby authorized to forthwith enter in his register such dismissal," filed in court by an adverse claimant, signed by authorized counsel, is a waiver of the adverse claim within the meaning of the 7th section of the act of 1872.

Any state of facts which shows that the person alleging the same has a better right to the premises sought to be patented, or any portion thereof, than the applicant, is the proper subject-matter of an adverse claim, and, when properly set forth, should be treated as such.

*Commissioner Burdett to Register and Receiver, Salt Lake City, Utah, November* 27, 1874.

On the 12th November, 1872, the application of M. T. Gisborn, O. Embody, W. D. Heaton, and W. E. Miller, for patent for sixteen hundred linear feet of the Mono mine, was filed in your office.

The notice and diagram were posted upon the claim from the 2d November, 1872, to the 30th May, 1873, and in the register's office from the 12th November, 1872, to January 13, 1873. The notice was published in the Salt Lake *Daily Tribune* from the 12th November, 1872, to 13th January, 1873.

It appears by the copy of the notice of location that the Mono mine was located on the 12th November, 1871, W. Heaton, M. T. Gisborn, and O. Embody claiming each 266⅔ feet, and H. D. Converse, T. R. Miller, Calvin Kirk, and E. McKendry claiming 200 feet each.

The claim is described in the location notice as extending 800 feet easterly and 800 feet westerly from the location monument.

Record was made of this location November 24, 1871, in the records of Ophir mining district, Tooele county, Utah.

On the 12th August, 1872, W. E. Miller filed in the office of the district recorder a notice of relocation of "200 feet in length undivided ground in the Mono lode * * * located the 12th day of November, A. D. 1871, * * * and running on and along the course of the lode-vein or deposit from the monument on which this notice is placed for the distance located."

In said relocation notice Mr. Miller also states that "I claim this claim on the further ground that the locators of the said 'Mono' lode, vein, or deposit are not entitled to a discovery-claim therein, the same lode,vein, or deposit having been previously discovered, located, and recorded under another name."

In paragraph two of the sworn application of the applicants, it is stated that "a question being debated whether the said locators were entitled to claim and hold by said location the whole of said 1,600 feet, or any more than 1,400 feet thereof, the said applicant, William E. Miller, on the 12th day of August, 1872, with the consent of all the persons then owning and holding the possessory right to said 1,600 feet, relocated 200 feet of the same."

It is not alleged that the locators of the Mono mine were the discoverers thereof. On the contrary, the relocation notice, which was filed by the applicants as evidence in support of their right of possession to said mine, and referred to in the sworn statement of the applicants as having been made with the consent of all persons "then owning and holding the possessory right" to said mine, contains the statement that the mine was not discovered by said locators, but that it had been previously discovered, located, and recorded under another name.

This admission made by the applicants that said mine had been previously discovered and located under another name should have been accompanied by a fuller showing that the previous location of said mine had been abandoned and forfeited under the local law, and that said premises were subject to relocation at the date of the location made by Gisborn *et al.*

There is testimony incidentally appearing in the record tending to the conclusion that a former admitted location was in fact permitted to lapse, and I am of the opinion that such is the fact; the evidence upon that point, however, ought to have been more specific.

The location made by Gisborn *et al.* could not in view of these facts be a valid location of more than fourteen hundred feet.

The relocation by W. E. Miller, of an undivided two hundred feet, was made August 12, 1872, after the passage of the mining act of May 10, 1872, and not in accordance with the provisions of the fifth section of said act.

The fifth section of said mining act provides that "all records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

The relocation notice under consideration simply described the premises intended to be located thereby, as consisting of two hundred feet in length, undivided ground in the Mono lode, "running on and along the course of the lode, vein, or deposit from the monument on which this notice [is] placed for the distance located."

I find no warrant either in the Congressional enactments governing in the matter of running locations or the local laws for this attempted relocation of two hundred feet by Miller. The recitals found in the record seem to indicate that it was an attempt by indirection to appropriate benefits awarded by law to discoverers only, by a party admitted not to stand in that relation to the claim for which patent is sought, and by the same process to correct an irregularity as to the number of feet claimed by each of the locators, patent upon the face of their location notice.

Objection is made to the issuance of a patent upon said application, for the reason that the register permitted certain papers in the case to be taken from his office, and that they were not in his custody during the entire period of publication of the notice. It appears that the plat of the claim, the notice of intention to apply for a patent, and the sworn statement of two persons in regard to the posting of the notice upon the claim, remained in the register's office during the entire period of publication of the notice. These papers were sufficient to inform all parties

in interest of the extent and *locus* of the claim for which patent was sought.

It does not appear that any party in interest was in fact damaged by this withdrawal. The doctrine cannot be admitted that a claimant may be defeated in his rights by a mere suggestion of irregularity in official conduct.

The proofs of compliance with the law, except as hereinbefore stated, are satisfactory.

On the 18th December, 1872, Lafayette Granger and Farley B. Granger filed in your office an adverse claim against said application for patent, accompanied by a plat certified to by Thomas Davis, U. S. deputy mineral surveyor, as having been made from an actual survey, which shows the extent of the conflict.

In their sworn statement they allege that they are citizens of the United States; that they are owners of and in possession of the Magnolia East and Magnolia West lodes; that the said application for patent conflicts with and embraces a portion of the Magnolia East and West lodes; that said lodes were located and have been held and worked in accordance with the local laws; that they are the "owners of, in possession of, and entitled to the possession of, so much of said mining ground as is embraced within the survey and diagram as is hereinbefore stated." They also allege that they had commenced an action in ejectment in the third judicial district court of Utah against said applicants. These adverse claimants filed copies of the original notices of location of said Magnolia East and Magnolia West lodes, but did not file an abstract of title to the premises referred to in said adverse claim.

It is urged that this adverse claim is insufficient, as the same is not accompanied by an abstract of title from the office of the proper recorder, tracing the title from the original locators to said adverse claimants.

The Hon. W. H. Smith, Assistant Attorney-General, in his opinion dated the 30th September, 1873, in case of the Jenny Lind Mining Company *et al. vs.* The Eureka Mining Company, states that "if the adverse claimants properly *allege* that they are the *owners* of the claim, that is good pleading and sufficient to notify the applicant for patent of what is claimed. I think an omission to file an abstract should be treated as an irregularity only, and not as a defect that vitiates the adverse claim."

This opinion was concurred in by the Hon. Secretary of the Interior, on the 24th November, 1873.

It appears by the certificate of the clerk of the court of the third judicial district, Utah, and by a copy of the original bill, exhibits, answer, amended complaints, and summons now on file with the case, that said adverse claimants commenced proceedings in said court on the 4th December, 1872, against said applicants, to recover possession of the Magnolia mine, alleged to be unlawfully withheld from plaintiffs by said defendants, and for damages.

This suit is still pending and undetermined.

It will be observed that this suit was commenced on the 4th December, 1872, twenty-two days after the date of filing said application for patent, and fourteen days before the date of filing said adverse claim.

It is contended by the applicants for patent that said adverse claim has been waived by a failure to commence proceedings in court within thirty days *after* the date of the filing of said adverse claim.

The seventh section of the mining act of May 10, 1872, provides that "it shall be the duty of the adverse claimant within thirty days after filing his claim to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment," and a failure so to do "shall be a waiver of his adverse claim."

This adverse claim having been made out in due form, and filed within the time prescribed by the statute, the only question presented is whether or not it is the duty of this office, under the law, to suspend proceedings upon said application until the suit commenced by said adverse claimants shall have been settled in a court of competent jurisdiction, or the adverse claim waived.

It is true that the statute makes use of the words "within" and "after," but these words should not in my opinion receive such a construction as to defeat a claimant who clearly brings himself up to the full measure of compliance with the objects and ends of the mining act.

It is not seriously objected that the suit commenced by the Magnolia claimants is not in every essential such an action as is contemplated by law.

As to the form of action, the parties, plaintiffs and defendants, the subject-matter of the controversy, and the court where the suit is pending, all is regular.

The principal ground upon which rests the objection to the sufficiency of the suit commenced before the day named in the act seems to be found in the view urged that the cause of action to be tried has its inception in the proceedings instituted by the applicant for a patent, and does not develop into a right of action until such time as the adverse claim shall have been filed.

I think this view is erroneous. The cause of action, the settlement of which is referred to the courts, is not one created nor is the remedy defined by the act of May 10, 1872. The subject-matter of the controversy to be determined is not whether or not an applicant shall have a patent from the United States for his location, but it is whether one party unlawfully withholds the possession of the premises or any part thereof from the other, and upon that issue the unlawful entry or cause of action may be shown to have accrued to the plaintiff at any time within the running of the statute of limitations, as prescribed by the law of the land.

It has grown into an axiom that the law favors the diligent suitor. I cannot reconcile it with the spirit and purposes of the mining act to hold this seeming excess of diligence on the part of the Magnolia claimants as fatal to the rights they assert.

In my opinion the Magnolia claimants have shown a substantial compliance with the law in the matter of filing their adverse claim and commencing suit; and as said adverse claimants appear to have prosecuted their suit with reasonable diligence, it will be necessary to suspend further proceedings upon said application until the controversy shall have been decided by the courts or the adverse claim waived, as prescribed

by the 7th section of the act of May 10, 1872. On the 31st December, 1872, J. S. Houtz, Jacob Ornstein, Morgan Grant, Warren G. Child, John L. Child, Wm. A. Rooks, and Thomas R. Miller filed an adverse claim against said application for patent, alleging in their sworn statement that they and one William Clark are the owners and entitled to the possession of the Shoo Fly mine.

This adverse claim was in proper form and filed within the time prescribed by the statute.

On the 30th January, 1873, suit was commenced upon said adverse claim.

On the 22d May, 1874, the attorneys for the plaintiffs and defendants filed with the clerk of the court of the third judicial district a stipulation, setting forth that "the said action, by the consent of the parties thereto, is hereby dismissed. The clerk of said court is hereby authorized to forthwith enter in his register such dismissal," &c.

A similar stipulation was filed with the clerk of the supreme court of Utah upon the same day, signed by the attorneys for the respective parties to the suit.

It appears by the affidavit of C. A. Gould, deputy clerk of the supreme court of Utah, dated the 8th day of August, 1874, that there is no "other order or stipulation in relation to the dismissal of said cause" on file in his office.

The Territorial statute of Utah, page 42, laws of Utah, nineteenth session, provides that "an action may be dismissed or a judgment of non-suit entered in the following cases:

"First, by the plaintiff himself at any time before trial upon the payment of costs, if a counter claim has not been made." * * *

"Second, by either party upon the written consent of the other." * * * "The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly."

The applicants insist that the filing of this stipulation is a dismissal of the cause, and that the Shoo Fly claim is no longer an element in the controversy here. I am of a different opinion. Until the court shall have given sanction to the stipulation by rendering its judgment thereon, the cause remains pending and undetermined. The parties to it may withdraw their action, and the court order the cause to proceed. The Territorial statute of Utah embodies the almost universal rule of practice in cases where, like this, issue has been joined; there must be a judgment by the court evidencing the disposition made of the case. The suit of J. S. Houtz *et al.*, who claim the Shoo Fly mine, is still pending. [See Secretary's ruling following.]

On the 7th January, 1873, William A. Rooks filed in your office what purports to be an adverse claim and protest against the said application for patent.

In his sworn statement Mr. Rooks alleges that he is a citizen of the United States; that on or about the 1st day of September, 1871, he entered into a contract with H. D. Converse, T. R. Miller, Calvin Kirk, and E. McKendry, by the terms of which agreement he (Rooks) was to furnish said Converse *et al.* with such provisions, tools, and supplies as would enable them to subsist, prospect for mines, and make discoveries

of lodes, veins, or deposits bearing precious metals; and that Converse *et al.* were by the terms of said agreement to prospect for mines and make locations of such mines as might be discovered by them in their own and his own (Rooks') names, each to have and own in his own right an undivided one-fifth interest in all such discoveries and locations; that he furnished the supplies and tools as directed by Converse *et al.*, and when required so to do; that on or about November 1st, 1871, the said Converse *et al.* located and occupied, in strict accordance with the district laws, a certain lode one thousand feet in length, to wit: five hundred feet each way from the place of discovery and the location monument, along the line of the road, and named and designated said lode the Giraffe; that they erected a monument on said lode, and placed thereon a written notice of location describing the premises located and giving the names of the locators, to wit: C. Kirk, Converse, Miller, McKendry, and Rooks, each claiming two hundred feet in said mine and location; that immediately after said location the locators thereof commenced to work upon said mine, and remained continuously in the possession thereof for some time; that before the expiration of the time prescribed by the district laws for making record of said location the other joint owners in said location, without his (Rooks') knowledge or consent, and while he was absent from the district, entered into an agreement with three of the present applicants for patent, viz: Gisborn, Embody, and Heaton, by which the three last-named parties agreed to do and perform all the work required by the local law to hold said claim, and in consideration thereof they were to have their names added to said location notice, each claiming two hundred feet additional, and to make record of said original notice as amended in the proper recorder's office; that Embody, Gisborn, and Heaton entered into the possession of said mine in accordance with the terms of said agreement, jointly with the other locators, and that subsequently, without the consent or knowledge of Rooks, they took down the original notice of location from said monument and wrote out another notice, and placed thereon the names of all of said locators, also the names of Embody, Gisborn, and Heaton, excluding, however, and leaving out the name of Rooks; that this notice named the lode the "Mono," and was placed upon the same monument previously erected, and upon which the Giraffe notice was posted; *that the Giraffe notice was never recorded*, but that such parties caused the said Mono notice to be recorded in the office of the district recorder; that the Mono location embraced the entire one thousand feet included in the original notice of the Giraffe, and that the Mono and Giraffe are one and the same lode; that the Giraffe notice has been cancelled or destroyed.

The statements made by Rooks are corroborated by the sworn statements of Calvin Kirk and T. R. Miller, two of the Mono locators.

Attached to the protest filed by Rooks is a certificate of the clerk of the court of the third judicial district, Utah, to the effect that W. A. Rooks commenced suit against the said applicants on the 8th day of August, 1872, "to recover a one-sixth interest in the Mono mine." He also filed a copy of the record and proceedings in said suit.

On the 1st September, 1874, the attorney for Rooks filed in this office a record of the proceedings in said suit, from the commencement thereof to the 1st August, 1874.

It appears that this suit is still pending and undetermined.

This filing cannot be considered as an adverse claim under the mining act. (See Secretary's ruling following.)

Mr. Rooks does not allege or show that the premises described in said application conflict with any mining property owned by him by virtue of compliance with the local laws and Congressional enactments. He simply alleges, and endeavors to establish the fact that he is equitably entitled to the possession of an undivided one-fifth interest in one thousand feet of the Mono location, his asserted equities growing out of certain transactions having to do with the mining-tract covered by that, and not by some other but conflicting tract or claim.

This is not such a controversy as can be taken notice of for any purpose by this office.

*Secretary Delano to Commissioner Burdett, July* 28, 1875.

I have examined the case of the Mono Mining Company *vs.* the Magnolia East and West company the Shoo Fly company, and William A. Rooks, on appeal from your decision of November 27, 1874.

I affirm your decision on the grounds stated therein, so far as it sustains the adverse claim of the Magnolia company, adding, with reference to the objection urged against it in the matter of proof of citizenship, that the law is complied with if citizenship be properly alleged and the fact be not controverted. (Eureka Co. *vs* Jenny Lind Co., Sec. Dec'n, p. 124; Kempton case, Sec. Dec'n, Jan. 2, 1875, p. 153.)

With reference to the adverse claim filed by the Shoo Fly company, I am of the opinion that the stipulation filed in court in the suit commenced by the adverse claimants, signed by properly authorized counsel, and so far as shown without fraud, was a waiver of the adverse claim within the meaning of the 7th section of the act of 1872. I therefore reverse your decision so far as it holds the Shoo Fly protest to be a valid subsisting adverse claim.

I do not agree with your ruling upon the protest in the nature of an adverse claim filed by William A. Rooks. This adverse claim was filed January 7, 1873. It alleged that the said Rooks was a citizen of the United States; that on or about the 1st day of September, 1871, he entered into a contract with H. D. Converse, T. R. Miller, Calvin Kirk, and E. McKendry, by the terms of which the said Rooks was to furnish said Converse *et al.* with such provisions, tools, and supplies as would enable them to subsist while prospecting for mines, and making discoveries of lodes, veins, or deposits bearing precious metals, and that the said Converse *et al.* were, by the terms of said agreement, to prospect for mines, and make locations of such as might be discovered by them in their names and in his name as joint discoverers, and that each of said parties was to own in his individual right one undivided fifth interest of all such mines or lodes so discovered; that the said Rooks furnished the provisions, tools, and supplies when required so to do, and fully complied with his said agreement; that on or about the 1st of November, 1871, the said Converse *et al.* located and occupied, in accordance with the local laws, a certain lode 1,000 feet in length, to wit, 500 feet each way from the place of discovery and location monument along the line of the lode, and named and designated the same the Giraffe; that they erected a monument on said lode, and placed thereon a written notice of

location, describing the premises located and giving the names of the locators, including the name of the said Rooks as one of the locators thereof, and claiming for each 200 feet of said mine and location; that immediately thereafter the said locators commenced to work upon said mine, and that they remained continuously in possession for some time; that before the time had expired in which the local laws required that record of the location should be made, the other joint owners of said mine, without the knowledge or consent of said Rooks and during his absence, entered into an agreement with three of the present applicants for patent for the Mono lode, to wit, Gisborn, Embody, and Heaton, by which the said three last-named parties agreed to do and perform all the work required by the local laws to hold said claim, and in consideration thereof they, the said three present applicants, were to have their names added to said location notice, each claiming 200 feet additional, and to make record of said original notice as amended in the proper recorder's office; that the said three applicants entered into possession of said mine in accordance with the terms of said agreement, jointly with the other locators, and subsequently, without the knowledge or consent of the said Rooks, they took down the original notice of location from said monument and placed thereon another notice, containing the names of the locators of said mine, including the names of the said Embody, Gisborn, and Heaton, but excluding therefrom the name of the said Rooks; that said last-described notice named the said mine the "Mono," and was posted upon the identical monument previously erected, and upon which the Giraffe notice was posted; that said Giraffe notice was never recorded, but the said "Mono" was; that the said "Mono" location included the identical 1,000 feet covered by the Giraffe location, and was the same lode as the Giraffe; that the Giraffe notice was concealed or destroyed, and that the said Embody, Gisborn, and Heaton, at the time they made all the arrangements and agreements aforesaid, had full knowledge of all the rights of the said Rooks, and that he was the owner of one undivided fifth of said original location.

Rooks on the 8th of August, 1872, commenced suit in the proper court against the said applicants to "recover one-sixth interest in the Mono mine," which suit is now pending and undetermined.

Upon these facts you held that whatever interest Rooks had in said mine, it did not amount to an adverse claim, because it did not originate by virtue of his compliance with the local laws and acts of Congress relating to mineral lands.

I am of opinion that the interest of Rooks was an adverse interest, and was the proper subject-matter of an adverse claim. From his statement it is clear that his right to one undivided fifth of the Giraffe location is superior to any interest that the applicants have in the same. I suppose that if Rooks had purchased the entire interest of his co-locators in the 1,000 feet and paid for it, and the present applicants had known of it before they pretended to acquire any interest in the same, that his claim would be an adverse one, and would properly delay the issuance of a patent until the matter could be heard in court. In my judgment, any state of fact which shows that the person alleging the same has a better right to the premises sought to be patented, or any portion thereof, than the applicants for patent, is the proper subject-

matter of an adverse claim, and when set forth in the manner required by the statute it amounts to an adverse claim, and should be treated accordingly.

I reverse your decision as to the said adverse claim of Rooks, and hold it to be sufficient.

I do not consider it necessary at this time to consider the objections raised relating to the application of the Mono company, inasmuch as they will more properly arise upon the return of the case to your office after decision in the courts, to which it must go upon the adverse claims of the Magnolia company and of Rooks.

### KEMPTON MINE.

Where the given name of a party executing a deed differs from his name as found on the location notice, identity of persons must be shown.

Full and complete copies of the respective conveyances are unnecessary under the rules. A complete abstract only is required.

The affidavit of continuous posting of the plat and notice on the claim must be made by one of the parties owning the mine at the date of entry at the local office.

The plat posted on the claim as required by the statute must be a copy of the plat filed with the application for patent.

Only citizens, or those who have declared their intention, are authorized to claim and locate mines.

A foreigner may make a mining-location and dispose of it, provided he becomes a citizen before disposing of the mine.

Proof that a party was not a citizen before disposing of his claim must be affirmatively shown by the adverse claimant.

*Secretary Delano to Commissioner Burdett, January* 2, 1875.

I have examined the case of Warren Hussey *et al.*, applicants for the Kempton mine, situated in the West Mountain mining district, Salt Lake county, Utah, on appeal by the Galena Silver Mining Company from your decisions of September 30 and November 10, 1874.

On the 10th of November, 1873, the said Warren Hussey and six others filed their application in the local office at Salt Lake City for the Kempton mine, and gave notice by publication in the usual manner. During the sixty days of publication the owners of the Neptune lode filed an adverse claim, which was afterward withdrawn upon some terms of compromise agreed upon by the parties. Hussey and others, pending their application for the Kempton mine, transferred all their interest to Lemuel U. Colbath, B. M. Du Rell, and Isaac Schoenberg, who were substituted as applicants for the Kempton, and have since prosecuted the application for a patent in their own names.

On the 7th day of September, 1874, and more than sixty days after the period of publication had fully expired, the Galena Silver Mining Company filed in the General Land Office a protest against the issuance of patent to the Kempton claimants, alleging that the Galena lode and the Kempton lode were identical; that the surface claims of the two conflicted; that the Galena was located many years before the Kempton, and that the Kempton had failed in several respects of complying with the law, and was not entitled to a patent. You properly rejected this protest, so far as it purported to be an adverse claim, on the ground that it had not been filed within the period of "sixty days of publication," as expressly required by the 6th section of the act of May 10,

1872, and you allowed the protestants, under the last clause of the said 6th section, to undertake to show that the applicants had failed to comply with the act.

You overruled all the objections that were suggested, and decided that the Kempton applicants were entitled to a patent. A motion was made to set aside your decision, which you also overruled. An appeal has been taken from both of the decisions.

On the hearing of this appeal the objections made before you have been urged, and perhaps some others which are now presented for the first time in the history of the case.

I will consider them, first, however, premising that they are not made by any party to the record in interest, but are made by a third party who stands in the light of *amicus curiæ*, and who has the right of showing only that the applicants have not complied with the law.

1. It is objected that it does not appear that B. F. Buck, one of the original locators of the Kempton mine, has ever transferred his interest in the same.

The original application for the Kempton patent, which is sworn to by five different persons, alleges that "Samuel Buck, under the name of B. F. Buck," was one of the original locators, and that the said Samuel had transferred his interest in the mine to John Segus, who was one of the applicants for patent. There is in the abstract of title furnished a certificate of the recorder of the conveyance from Samuel Buck to the said Segus. I think this is sufficient. Names are arbitrary. Identity is the important matter, and the identity of Samuel Buck with the B. F. Buck of the location is satisfactorily shown.

2. It is further objected that full and complete copies of the respective conveyances, showing title in applicants, are not set forth in the records.

It is conceded that brief abstracts of the contents are set forth. Under the rules and regulations I think this is sufficient. If more should be required, the rules should be changed.

3. It is also objected that there is no affidavit of the *proper party* that the plat and notice were posted in a conspicuous place on the claim during the period of publication.

The 6th section provides that "At the expiration of the sixty days of publication *the claimant* shall file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during said period of publication." It is argued that the claimant referred to is one of the original locators. I think that this is not necessarily so.

When the original locators make the application for patent, then one of them must make the affidavit, but when the original locators have assigned their interest and the application is made by the assignees, then the assignees are the claimants, and one of them may make this affidavit. In this case it was first made by R. T. Anderson, the superintendent of the mine, and afterwards by Colbath, who is one of the present applicants, and is therefore one of the claimants within the purview of the 6th section.

4. It is also objected that there is no sufficient proof that the plat and notice were posted in a conspicuous place on the claim. The objection is not that there was not *a* plat and notice posted on the claim, but that there is no proof *what plat and notice* was thus posted.

The 6th section provides that the applicant for patent shall file in the proper land-office, under oath, an application together with a plat and field-notes of the claim made by the authority of the United States surveyor-general, "and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted as aforesaid, and shall file a copy of said notice in such land-office, and shall thereupon be entitled to a patent," etc. The application for patent in this case alleges "that the notice of intention to apply for a patent, together with a plat of the survey of said mine, was duly posted upon the same on the 31st day of October, A. D. 1873, in a conspicuous place, as will appear by the affidavit of W. A. Watson and Henry Curran, herewith submitted, marked Exhibit 'E.'"

When the papers reached this Department "Exhibit E" was not found in its proper place in the application, but there was found detached from the application an affidavit of W. A. Watson and Henry Curran, marked in red ink "Exhibit E," in the same handwriting in which the other exhibits attached to the application were written. This affidavit stated "that a plat and notice, of which the attached are true copies, were posted conspicuously on the Kempton mining-claim on the 31st day of October, A. D. 1873; that affiants were present and saw the same so posted."

There is also found among the papers a plat of the survey of said Kempton mine, certified to by the surveyor-general of Utah, numbered 19, dated October 1, 1873, and a notice of application for patent, partly written and partly printed, dated October 11, 1873, and in due form. This plat and notice bear physical evidence that they have been attached to the affidavit of Watson and Curran. There is in the upper left-hand corner of each a peculiarly-shaped puncture, which upon its face shows that it was made in each paper at the same time and while they were together. There is also physical evidence that the papers thus attached were afterwards separated and attached in an entirely different manner by mucilage. The plat is the largest paper of the three, the notice is next in size, and the affidavit the least. The notice has been attached to the bottom of the plat by mucilage, and in the same way the affidavit has been attached to the bottom of the notice. The evidence of the attachment of the plat and notice amounts to absolute demonstration. The ragged edges of the two exactly fit each other. The evidence of the attachment of the notice and affidavit is not so complete, but it is quite satisfactory. The plat has a small hole in each corner, such as would be made if it had been tacked up or posted.

My own opinion, founded upon an examination of the papers, is that the affidavit, notice, and plat were originally attached by a metallic fastening in the upper left-hand corner of each, and, being thus attached, were filed with the application as Exhibit E; that after being thus filed the register detached them and attached the plat and notice by mucilage, as described above, and posted them up in his office, and that he afterwards attached the affidavit and transmitted them to the Commissioner of the General Land Office. The Commissioner has certified that the

plat and notice were attached, and he thinks the affidavit was also attached to them when they were received from the local office.

There are on file in this case the affidavits of numerous persons that the plat and notice were posted on the 31st of October, 1873, in a conspicuous place on the claim, and so remained during the entire period of publication. It is true they do not specify particularly what plat and notice, because at the time they were taken there was no controversy about their contents; but they do show that a plat and notice, which they all seem to have understood as in due form, were properly posted.

I entertain no doubt of the fact that a plat and notice, of which those above referred to as a part of Exhibit E were either copies or duplicate originals, were duly posted on the claim and for the period of publication, and I therefore overrule the last named-objection.

5. Finally, it is further objected that there is no allegation or proof that the original locators of the Kempton mine were citizens of the United States, or that they had declared their intention to become such at the time the location was made.

The application, after setting out the location and transfer of said claim, alleges "that all the above-named locators of said claim and their grantees *are* citizens of the United States."

This is the only allegation or proof on this point contained in the entire record.

The first section of the act of May 10, 1872, provides "that all mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase *by citizens of the United States and those who have declared their intention to become such*, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable, and not inconsistent with the laws of the United States."

The 6th section provides "that a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation *authorized to locate a claim under this act*, having claimed," etc. These provisions, and those of the mining act of July 26, 1866, and of the pre-emption and homestead acts, indicate clearly, to my mind, the intention of Congress that no one but a citizen, or a person who had declared his intention to become such, should have the privilege of locating a mine, or acquiring a patent therefor.

The language is too clear to admit of any other construction. I suppose the reason of the rule was to prevent foreigners who might be inimical to the well-being and prosperity of the government from obtaining possession and control of the vast interests which grow out of the mineral lands of the United States.

I do not wish to be understood as deciding that a person who is not a citizen, or has not declared his intention to become such, cannot make a location of a mine, or dispose of it, provided he afterward becomes a citizen before he disposes of the mine. "Naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture."

(Osterman *vs.* Baldwin, 6 Wall., 122.) An assignor can transfer no greater interest to his assignee than he himself possesses. While he is unnaturalized he has no right to locate a mine. If he does so, and disposes of it before naturalization, a subsequent naturalization would not, in my opinion, save his location. If, therefore, it appeared in this case that the original locators were not citizens, or had not declared their intention to become such, at the time their location was made, and that they had not become citizens when they transferred the mine, I should have no hesitation in holding that the transfer was invalid and the claim of the applicants was not good. But there is no such allegation or proof in this case, and I should not be justified in presuming a state of fact which would work a forfeiture of the claim. The allegations, or pleadings, (if I may be allowed the expression,) in proceedings of this kind, should be construed liberally, as I have heretofore held, and not, as at common law, most strongly against the pleader. Under this rule of construction I find myself obliged to overrule the objection as to citizenship, which is accordingly done.

I affirm your decision.

RED PINE MINE.

An action in equity to restrain applicants for patent for a mining-claim from further prosecution of their application is not such an action as can be taken notice of by the General Land Office.

A location notice which, after naming the locators and their interests to the extent of 1,000 feet, concludes as follows: "We claim 500 feet easterly and 500 feet westerly." "Situate about 200 feet easterly from the Sacramento"—is not void for uncertainty in the Ophir mining district, Utah, if location was made prior to May 10, 1872.

*Commissioner Burdett to Register and Receiver, Salt Lake City, Utah, January* 18, 1875.

On the 22d August last, you transmitted the papers in case of the application of Marcus Daly, for patent for the Red Pine mine, Utah.

By the papers in the case it appears that the said application for patent was filed in your office on the 25th day of April, 1874; that the notice and diagrams were posted upon the claim from the 21st April, 1874, to the 22d August 1874, and in the register's office from the 6th June, 1874, to the 22d August, 1874; that the notice was published in the Salt Lake *Weekly Tribune* on the 6th June, 1874, and for eleven consecutive weeks thereafter.

The Red Pine mine was located July 18, 1871, and record of such location was made on the same day in the recorder's office of Ophir mining district, Tooele county, Utah.

By the abstract of title it is shown that the applicant has record title to the premises claimed.

On the 22d August, 1874, the applicant having filed proof of compliance with the local laws and Congressional enactments, was allowed to make entry of the premises as applied for, no adverse claims having been filed. On the 17th September, 1874, Enoch Totten, Esq., filed in this office a paper purporting to be a copy of a bill in equity filed in the district court for the third judicial district, Utah, the general nature and object of which seems to be to restrain said Daly and one Walker and others, who are joined as defendants, from further prosecuting said

application for patent. The plaintiffs named in said bill are Isaac S. Waterman and George R. Ayers. Whether or not any proceedings have in fact been had under said bill does not appear, nor is it necessary to inquire, since it is not such action as can be taken notice of by this office.

At the same time were filed the affidavits of Geo. R. Ayers and Levi Smiley.

In the sworn statement of Mr. Smiley he alleges that he had never seen the survey-stakes of the "Red Pine survey, and never had any knowledge that such a survey had been made;" that he had never seen the plat and notice of application for a patent for said mine, although he had frequently passed over the ground included in such survey since June 1, 1874; that he had no knowledge that said application for patent had been made until September 7, 1874; that he is mining captain on the St. Louis and Hidden Treasure mine.

In his sworn statement Mr. Ayers alleges that he is the same person who made oath to said bill, which was filed in the office of the clerk of the court of the third judicial district, Utah, on the 11th September, 1874, in which Isaac S. Waterman and Geo. R. Ayers are plaintiffs.

In the case under consideration no adverse claim was filed within the time prescribed by the statute.

The 6th section of the mining act provides that an adverse claim to be considered must be filed within the sixty days' notice by publication, "and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act."

The protestants urge that the location of the Red Pine was void for uncertainty.

The 4th section of the district laws in force at the date of said location provides "that the notice shall state the number of feet claimed in the location, number claimed each side of monument, the names of the parties locating the same, and the number of feet claimed by each locator, name by which the ledge or lode shall be known."

SEC. 7 provides that "in making a record of location of any claim the same shall be definitely described with reference to some natural or artificial monument."

SEC. 21 of said laws provides that "the recorder in person or through his deputies go on the ground before filing a location for record, and see that the proper notice and monument are placed thereon, and note on the notice and in a book for that purpose the locality of said location."

The location notice in the case under consideration reads as follows:

"RED PINE, LOCATED JULY 18, 1871.

"*Notice.*

"We, the undersigned, have this day located and claimed 1,000 feet on this lead, lode, ledge, or deposit; together with all dips, spurs, and angles. We claim it according to the laws of Ophir mining district and the laws of the United States. This mine to be known as the Red Pine.

"Jesse Foster—400 ft.

"Cancey Porter—200 feet.

"E. V. Aukram—200 feet.
"W. Aukram—200 feet.
"We claim 500 feet easterly and 500 feet westerly.
"Situate about 200 feet easterly from the Sacramento."

This notice seems to meet all the requirements of the local law, and to have been made in accordance therewith.

It will be observed that it is made the duty of the recorder or his deputy to "go on the ground before filing a location for record, and see that the proper notice and monument are placed thereon."

This notice *was filed for record* on the 18th July, 1871, *and recorded.* This act of the recorder may be fairly appealed to as being corroborative of the sworn statement of the applicant that the local law had been complied with in the matter of said location. Accompanying the other papers filed with said application is the sworn statement of two persons who allege that they are well acquainted with the Red Pine mining-claim, and that the survey of said claim made by J. Gorlinski, deputy mining surveyor, in their presence, "embraces the identical ground as originally claimed by the locators and grantors of said mining-claim."

The applicants allege compliance with the local laws, and have filed satisfactory evidence of such compliance.

The survey seems to have been regularly made, and the notice and diagram conspicuously posted up on the claim, to wit: upon the discovery-shaft of said Red Pine lode.

Messrs. Waterman and Ayers also urge that the notice of intention to apply for a patent was not properly given, for the reason that the published notice required adverse claims to be filed within sixty days from the 6th of June, 1874, the date of the first publication, while the notice posted upon the claim, dated April 21, 1874, concludes with these words: "Any and all persons claiming adversely * * * are hereby notified that unless their adverse claims are duly filed, as according to law and the regulations thereunder, within sixty days from the date hereof, with the register of the U. S. land-office, Salt Lake City, * * * they will be barred in virtue of the provisions of said statute."

This gratuitous information on the part of the applicant is not shown to have injured any party or person, nor yet could their rights have been adversely affected had any parties filed an adverse claim against said application "according to law and the instructions thereunder."

Having carefully considered all the papers filed by the applicant and protestant, I am of the opinion that the applicant has shown compliance with the law, and that patent should issue for said mine as applied for.

### PETROLEUM CLAIMS.

*Commissioner Burdett to Surveyor-General, Stratton, San Francisco, California, Jan.* 30, 1875.

Petroleum claims may be entered and patented under the mining act of May 10, 1872.

DEPOSITS OF UMBER.

*Commissioner Burdett to Wm. Clayton, Salt Lake City, Utah, Jan.* 30, 1875.

Lands containing valuable deposits of umber may be patented under the mining acts of Congress.

The price per acre depends upon the character and formation of the deposit. If it is found in veins or rock in place the same rates per acre must be paid as in case of lode-claims, viz., $5.

If the umber is not found in veins or rock in place, the proceedings would be the same as are prescribed in case of placer-claims, and the rates $2.50 per acre.

EXPENDITURES ON RELOCATED MINES.

*Commissioner Burdett to Wm. A. Arnold, Central City, Col., Jan.* 30, 1875.

Where a party applies for a patent for a relocated mine, it will be necessary for him to offer satisfactory proof that a sum of not less than five hundred dollars has been expended upon the mine *by the applicant or his grantors.*

The fact that five hundred dollars had been expended upon the claim by a person or persons who subsequently abandoned it, will not relieve the applicant from the necessity of showing *that he or his grantors* have expended thereon the amount required by law.

EWING *vs.* HARTMAN.

*Commissioner Burdett to Register and Receiver, San Francisco, California, February* 18, 1875.

The land having been returned as mineral, the burden of proof was upon the agricultural claimants.

The testimony presented at the hearing shows that portions of the surface are susceptible of cultivation, and the balance appears to be used for grazing. While it is not shown that valuable deposits have been found in the Maymoon location, yet, in view of the discoveries so far made, and the proximity of the land to the Oakville and Bella Union Quicksilver mines, the [agricultural] entry of Hartman will remain suspended to await further developments in the premises, as recommended by you.

DEPUTY MINERAL SURVEYORS.

Instructions to deputy mineral surveyors in States where the Commissioner of the General Land Office is *ex officio* surveyor-general.

*Commissioner Burdett to Smith Scogin, Hot Springs, Arkansas, February* 19, 1875.

In the discharge of your duties as deputy mineral surveyor, you will be governed by the instructions herein contained and the circular instructions from this office.

No official survey will be made except upon application of the claimant or his duly authorized agent.

The claimant must in all cases make satisfactory arrangements with the United States deputy mineral surveyor for the payment of his ser-

vices and those of his assistants in making the survey, as the United States will not be held responsible for the payment of the same.

In making a survey of a claim, you will begin at some corner of the public surveys, and run a line either by course and distance, or by triangulation, to a corner of the claim, designating this corner as "corner No. 1; beginning." You will then calculate the true course and distance in a direct line from the corner of the public surveys to said "corner No. 1."

From corner No. 1 you will proceed with the survey of the claim, giving courses and distances of the exterior boundaries, establishing a corner at each angle of the survey.

You will describe the corners fully, stating whether a post or stone, the size, depth in the ground, and how marked.

The corner monuments will be marked No. 1, No. 2, etc., as you proceed with the survey; also with the number of the survey.

You will note all objects crossed by your lines of survey, such as prior surveys, lodes, ditches, ravines, or lines of the public surveys.

You will note all shafts and their depths, all adits, cuts, drifts, shaft-houses, mills, etc., and represent the respective locations of the same upon the plats.

After describing fully the improvements on the claim, you will give your opinion in regard to the actual value thereof.

You will give the names of adjoining claimants, if any, and state the quarter-section, township, and range in which the claim is situated.

On the plats the section lines will be represented in *black* ink; the quarter-section lines in *red*.

The field-notes will be made upon paper of uniform size.

The plats will be prepared upon paper 12 x 16 inches in size, [inside of marginal line, allowing a margin outside of such line for binding.]

In each case *four plats* and *one copy* of the original field-notes will be transmitted to this office for approval.

When the same have been examined and approved, the original field-notes will be retained in this office; one copy of the plat will be transmitted to the register of the proper land-district, to be retained on his files for future reference, and two plats and one copy of the field-notes will be returned to you to be handed the applicant, to be disposed of as follows, viz:

1. One copy of the plat to be posted on the claim; and,
2. One plat and the copy of field-notes to be filed by the applicant with the register and receiver, with his application for patent.

Accompanying the plat and field-notes transmitted by you to this office for approval, you will forward the affidavits of at least two responsible parties that an amount of not less than five hundred dollars has been expended upon the claim in actual labor and improvements.

Great care should be exercised to have the courses and distances expressed in the field-notes correspond with those represented upon the plats.

PRINCE OF WALES, ANTELOPE, AND WANDERING BOY *vs.* HIGHLAND CHIEF AND WELLINGTON.

This decision overrules application to set aside patents to the Prince of Wales, Antelope, and Wandering Boy mines, Utah, and institutes proceedings to cancel so much of the Highland Chief patent as conflicts with the Prince of Wales.

PRINCE OF WALES *vs.* HIGHLAND CHIEF.

The Prince of Wales was first located and it made the first application for patent. The adverse claim of the Highland Chief was filed after period of publication had expired, and would have been rejected had the local offices forwarded it to the General Land Office.

The applicants for patent should not suffer by the neglect of duty of any officer. The application of the Highland Chief did not, but the patent did, include part of the Prince of Wales.

The final survey and patent of the Highland Chief did not follow the application.

Publication of notice considered.

In mining cases consent cannot give jurisdiction. Substantial compliance with the statute is required.

WANDERING BOY *vs.* HIGHLAND CHIEF

The Wandering Boy was the prior location, and, as above, should have been excluded from the Highland Chief patent.

PRINCE OF WALES.

Its location notice is not void for uncertainty. Miners' location notices should not be held to technical accuracy, but are sufficient if they put an honest inquirer in the way of finding the lode.

Parol evidence is admissible to define what tract is embraced in a location.

It is too late after patent has issued to make objection that publication of notice from January 6, 1871, to April 6, 1871, was not a compliance with the statute of July 26, 1866.

Proof of posting notice and diagram on the claim should be specific as to *when* the period of such posting commenced. It is too late after patent has issued to object to the proof because it is not thus specific. The objection that applicants did not have title at the date of application is insufficient, unless such fact is clearly shown. Contracts for conveyance, made before application, are sufficient if full title was acquired before patent issued.

A clerical error in the register's final certificate in a mineral entry in an owner's name, as Butterfield instead of Butterwood, does not affect the validity of a patent issued under the name of Butterwood.

WANDERING BOY.

The location notice, application for patent, and final survey agree in describing the same premises.

Proof of publication, which states that the notice was published for a period of ninety days, commencing April 15, 1871, is *prima facie* sufficient.

That notice and diagram were posted on the claim five days after publication was commenced, and thereafter for ninety days, was an irregularity only, and not fatal.

Locators and intermediate owners other than applicants will not be presumed aliens, in the absence of allegation or objection prior to issuance of patent.

In a subsequent patent it is proper to recite the fact that a prior patent had inadvertently and erroneously issued for part or all of the premises. The fact that Moore & Co., patentees and vendors of the Wandering Boy, have still an interest in seeing that their patent is unclouded, is sufficient to support their application to set aside the Highland Chief patent.

ANTELOPE.

Where there are no adverse interests, the patent for a mine will not be disturbed, notwithstanding irregularities in issuing it.

Examination of the 7th section, act of May 10, 1872.

Where an applicant for patent relinquishes the portion of his premises embraced in an adverse claim, further proceedings before the Department will not be stayed.

The only question before the court in mining application contests is the right of possession to the premises in dispute.

The mere fact of an adverse claimant obtaining judgment in court in his favor does not necessarily entitle him to a patent upon filing a certified copy of the judgment-roll and the certificate of the surveyor-general, and paying fees and price of land.

*Secretary Delano to Commissioner Burdett, April* 1, 1875.

I have carefully considered the application of Samuel S. Walker *et al.*, owners of the Prince of Wales mine, situate in Big Cottonwood mining district, in Salt Lake county, Utah, to have proceedings instituted, in the name of the United States, to set aside and annul the patent issued to Allen Schenck and Norris W. Mundy for the Highland Chief mine, situate in the said Big Cottonwood district, and also the like application of John M. Moore *et al.*, owners of the Wandering Boy mine, in the aforesaid mining-district, to set aside and annul the patent for the said Highland Chief mine.

I have also considered the several applications made by Schenck and Mundy to have proceedings instituted in the name of the United States to set aside the patents heretofore issued to the said Samuel S. Walker *et al.*, for the Prince of Wales and Wandering Boy mines; and also the patent issued to J. R. Walker *et al.*, for the Antelope mine.

All of the above-named mines are located in the same neighborhood, and are of such supposed value as to have induced, between the respective claimants, protracted and heated contests before this Department. I shall follow the example of counsel, and treat all the applications as consolidated, and shall dispose of them in the order in which they are above named, premising that I have not the time that would be necessary to dwell, in detail, upon all the various alleged defects that have been commented upon by the learned counsel who have appeared and made oral arguments before me. I shall endeavor to omit none that are material.

1. The Prince of Wales against the Highland Chief.

The Prince of Wales location was made August 1, 1870, and recorded in the proper mining-district August 3, 1870. The Highland Chief location was made and recorded in the proper mining-district September 12, 1870.

The Prince of Wales made application for patent for 1,200 linear feet of the lode, with surface-ground of 100 feet in width, December 30, 1870. The Highland Chief filed an adverse claim against the Prince of Wales with the register at Salt Lake, July 29, 1871, having filed on the 20th of June its application for a patent. On the 9th of November, 1871, the register transmitted to the Commissioner of the General Land Office the application of the Highland Chief and accompanying papers, but for some reason he neglected to transmit the application of the Prince of Wales.

On the 7th day of September, 1871, the Prince of Wales filed an adverse claim against the Highland Chief, but it was rejected because not sworn to. Afterwards, January 8, 1872, it filed another adverse claim, duly sworn to, but this was not done until after the period of publication had expired. The Acting Secretary, on appeal, April 13, 1872, held that the adverse claim of the Prince of Wales should be rejected, because not filed within the period of publication. June 22, 1872, a patent issued to Schenck and Mundy for the Highland Chief.

It appears from the foregoing statement that the Prince of Wales was first located and recorded, and that it made the first application for patent, and that the Highland Chief filed an adverse claim thereto after the period of publication had expired. If this application and adverse claim

had been forwarded to the Commissioner by the local officers, as they were bound to do under the instructions, the adverse claim would have been rejected, because not filed within the period of publication. The fault was not that of the Prince of Wales, and it ought not to suffer by the neglect of duty of any official. (Railroad *vs.* Smith, 9 Wall., 99.)

The Highland Chief afterwards made application for patent while that of the Prince of Wales was pending. The Prince of Wales filed an adverse claim after the period of publication had expired, and the Highland Chief for that reason caused its rejection. In other words, the Highland Chief, by the decision of this Department, struck out and got rid of the adverse claim of the Prince of Wales for the very reason which should have excluded its adverse claim to the Prince of Wales application. The Prince of Wales had the prior right and the prior location, and it was manifest error in this Department to allow the Highland Chief to transpose the the condition of the parties, and thereby materially change the rights of the contending parties.

2. It is claimed that the patent for the Highland Chief did not follow the final survey in this, to wit: that its final survey did not include any of the surface-ground of the Prince of Wales, while it is conceded that the patent did include all the surface-ground where the Highland Chief crosses the Prince of Wales and the discovery-shaft of the Prince of Wales and many of its valuable works.

The field-notes of this survey, made October 5, 1871, upon this point are as follows: "From post No. 2, I run N. 53° E., 919 (feet,) to Prince of Wales claim, 1,200 (feet;) leave Prince of Wales claim." And again: "From post No. 4, I run S. 53° W., 258 (feet,) to Prince of Wales claim, 495 (feet;) leave Prince of Wales claim."

The natural construction of this language is, that the spaces between the 919 and 1,200 feet on one side, and 258 and 495 feet on the other side, were omitted. If they were, the description is correct. If there is doubt whether they were omitted or not, it is proper to explain that doubt by the testimony of experts in surveying. Mr. Freeman, the deputy United States mineral surveyor, who made this survey, testifies that he did omit the surface premises of the Prince of Wales, and that he intended so to do. This is highly probable from the nature of the case. He found the Prince of Wales in the actual occupancy of this surface-ground. He saw that it had its discovery-shaft and valuable mining works upon it, and he probably knew that the Prince of Wales was the first locator, inasmuch as he was a surveyor and familiar with the mines in that location.

He would, therefore, very naturally pass over the premises, and exclude them from his survey, unless he had directions from his employers to do otherwise. I do not think that he had any such instructions, and my reasons for so thinking will appear when I come to consider another branch of this subject. It is true that Freeman, in making up the area of his survey, did not exclude from such area the surface-ground of the Prince of Wales, amounting to 24–100 of an acre. It probably escaped his recollection when he came to make his plat. In my judgment, the weight of the evidence shows that the surface-ground was excluded from the survey. It should, therefore, have been excluded from the patent, and it was error to include it.

3. It is claimed that the final survey and patent of the Highland Chief did not follow the original application and notice, and that the claim was floated to the eastward, so as to include the discovery and works of the Prince of Wales.

The Highland Chief was located September 12, 1870. In the location notice the lode is described as "commencing at the discovery-stake and running 600 feet in a *southerly* direction, and 600 feet in a *northerly* direction therefrom. * * * Situate about five or six hundred feet *westerly* from the Young Columbia and Wandering Boy lodes, Big Cottonwood district, Utah Territory."

A location 500 or 600 feet westerly from the Wandering Boy lode would exclude the premises now in controversy.

The diagram of the Highland Chief, attached to its application for patent, represents the Prince of Wales and Wandering Boy lodes as lying to the east of the premises claimed by the Highland Chief. The application and publication notice both allege that "from discovery-shaft the lode extends northeasterly six hundred (600) feet and southwesterly therefrom six hundred (600) feet. There are no known adjoining claimants at either end. The nearest known claims being the Prince of Wales and the Wandering Boy mines *on the easterly side of said lode.*"

Under such an application and published notice it is very clear to my mind that the applicants had no right to go to the eastward so as to take in and appropriate the mines which they allege are on the "easterly side" of their lode. The object of requiring notice to be given by publication is to inform all parties, who may have an adverse interest, of the premises sought to be acquired, so that they may appear and assert their rights. If the notice describes premises in which others have no interest, then such other persons may safely neglect to appear and set up any claim. They are bound by the notice, and if they neglect it, they must do it at their peril; but the moment they find that the notice does not ask for anything in which they have an interest, that moment they may safely sleep, if they please. They are not bound, and should not be bound, to look after subsequent proceedings for fear that there may be a subsequent claim set up to their property. There can be no subsequent claim that varies materially from the original one, which is embodied in the application and publication. The law must be followed. The proceeding is a special statutory proceeding, and all the provisions of the law must be carefully, and, as some authorities say, strictly pursued. Actual notice without publication will not answer. Written notice would not be sufficient, because the statute says that there must be notice by publication.

If the published notice described certain premises, none other can be afterwards claimed and appropriated without a new application and new published notice, and if there should be a subsequent effort to include premises other than those included in the original application and notice, and an adverse claimant should appear and assert his claim to the new premises thus sought to be appropriated, and should fail in maintaining his claim, either by reason of not filing the same in time or for defect in form, he would not, in my opinion, be thereby in any worse position than he would have been if he had not appeared at all. In this class of

cases consent cannot give jurisdiction. It is a substantial compliance with the statute which alone can give jurisdiction.

As we have seen, the location, application, and published notice of the Highland Chief severally excluded the premises of the Prince of Wales, now in controversy. It further appears, from the testimony on file, that the owners of the Highland Chief, in the early stages of their proceedings for patent, did not intend to include the Prince of Wales mine.

Mr. Stevenson, who was the surveyor that made their original diagram, testifies that he was instructed to avoid the Prince of Wales, and that he did so. There is nothing in the case that indicates any intention on their part to appropriate it until after they discovered that the final survey might be construed to include it, and they had succeeded in excluding its adverse claim. I think it was error to include it in their patent.

THE WANDERING BOY.

This mine was located and recorded August 6, 1870, and before the Highland Chief. Its owners have made an application like that of the Prince of Wales. The Highland Chief crosses their surface-ground, and they ask that proceedings may be commenced in the name of the United States to set aside its patent. From what has already been shown, it appears that the Wandering Boy was excluded from the location, and application and notice by publication of the Highland Chief, and for these reasons it also should have been, but was not, excluded from the patent to the Highland Chief.

I am therefore of opinion that the applications of the Prince of Wales and Wandering Boy should be granted, unless the applications made by Schenck and Mundy to set aside their patents should be granted, and I will proceed to consider them.

THE PRINCE OF WALES.

1. To this claim it is objected that its location is void for uncertainty. The notice of location is as follows:

"The Prince of Wales Lode.

"Discovered by Thomas E. Owens, August 1, 1870. We, the undersigned, in company and undivided, claim 1,200 feet on the above lode or mass of ore, or whatever it may contain, 200 feet for discovery and 1,000 feet for location along this vein, wherever it may run, together with all dips, spurs, angles, and variations, with all the privileges granted by the laws of the district and the Congressional laws of the United States. This lode is situated on the right-hand fork of the creek known as Silver Fork, within about 200 feet in a southeasterly direction of the lode called the 'Antelope,' in Big Cottonwood cañon, and now supposed to run in a southwesterly and northeasterly direction.

"*Discovery.*—Thomas E. Owen, 400; H. W. Bishop, 200; T. Robinson, 200; J. J. Dussain, 200; H. Burnette, 200."

In considering the question now presented it should be borne in mind that the discovery of lodes, and the preparation of location notices for the same are generally made by unlettered men, and it would be productive of great hardship and perhaps generally result in an entire loss of their valuable discoveries if they were held to technical accuracy in

their notices of location. Accordingly it has been uniformly held by the courts and this Department that extreme liberality should be shown to these notices, and if they were sufficiently certain to put an honest inquirer in the way of ascertaining where the lode was, that was sufficient. I think the present notice is reasonably certain, and that its *locus* could be found from the description given.

It is much more certain that many locations that have been carried into patent even when contested.

2. It is objected that the application for patent and the final survey and patent do not conform to the original location.

That parol evidence is admissible to aid in the location of a mining-claim and define what tract is embraced in a location, is well settled. (Com'r G. L. O. Instructions of Nov. 20, 1873; Kelly *vs.* Taylor, 23 Cal., 14.)

The testimony of four deputy mineral surveyors and four others, their attendants, has been filed in this case, and shows that they have made a careful survey of the premises, and find that the location, application, and patent are for substantially the same premises. These persons have the means of knowing, and have no motive that I can see for misstating the facts. This objection, I think, is not supported by the weight of the evidence, and is therefore overruled.

3. It is objected that the proof of publication of the notice of intention to apply for patent was published *from* January 6, 1871, *to* April 6, 1871, a period of only eighty-nine days, including both the first and last days of publication.

One of the vices of this objection is, that assuming the facts as stated, and the publication was for 90 days instead of 89, that raises the vexed question whether the first or last day, or either, should be excluded in the computation; and upon that point the authorities are numerous on both sides, although it is the rule of this Department that the first should be excluded. (Eureka case.) But this objection, if made at all, should have been made before patent, and it is too late to make it after the patent has issued. (Curtis on Pat., § 274.)

4. It is also objected that the proof of posting the notice and diagram on the claim does not show when, where, or for what period the same was posted.

The counsel who make this objection refer to the affidavit of John Dobbie and George Murray to sustain the same.

These persons both state "that of their own certain knowledge they are aware that a certain diagram was and has been posted *for the period of ninety days*, subject to the inspection of all whom it may concern, upon that certain mining ground lying, being, and situate in Silver Fork, Big Cottonwood cañon, Big Cottonwood mining district, Salt Lake county, Territory of Utah, and known and recorded as the Prince of Wales lode; and that said diagram is a true and correct copy as made from survey of said ground, and now on file in the land-office in Salt Lake City, said survey and diagram having been filed for the purpose of securing and obtaining a United States patent for the premises as hereinbefore mentioned, viz: 'The Prince of Wales, by Thomas Butterwood,'" etc.

This affidavit is not as specific as it should have been as to *when* the

period of ninety days commenced, but the objection should have been made before patent.

5. It is objected that the applicants for patent did not have the title to the claim at the time the application was made, and that they did not acquire it for some time thereafter, and that therefore their application was absolutely null and void.

It is clearly shown that they acquired title in due form by conveyances before the patent issued. It is not shown that they had no interest in the claim at the time the application was made, but on the contrary it is alleged by counsel that they had contracts for conveyances before the application was made. This is highly probable. It is extremely improbable that business men would commence an application of this kind without having any interest in the premises or mine claimed.

If they acquired full title, as they did before the patent issued, it is not void, and the irregularity is not such as would justify commencing proceedings to set aside the patent.

6. It is further objected (and this is the last objection insisted upon) that the application for patent was made by Thomas *Butterwood et al.*, but that the final certificate of entry was issued to Thos. *Butterfield et al.*, and that as the patent issued to Thomas Butterwood *et al.*, it is illegal and void.

Thomas Butterwood was, without the possibility of a doubt, the true name of one of the applicants. His name and his genuine signature appear frequently in the papers. There is nothing to show that he ever transferred or pretended to transfer his interest to Thomas Butterfield. The officer in issuing the final certificate, by inadvertence and mistake, issued it to Thomas Butterfield *et al.*, when he intended to issue it to Thomas Butterwood *et al.* I entertain no doubt upon this point, and I am equally clear that this clerical error ought not to, and does not, affect the validity of the patent.

THE WANDERING BOY.

1. It is objected that the location and application for patent and final survey do not agree.

The notice of location is as follows:

"The Wandering Boy Lode.

"Notice is hereby given that we, the undersigned, claim fourteen hundred (1,400) feet on this lode, lead, or mass of ore for mining purposes, supposed to run in a northeasterly and southwesterly direction, situated about three hundred feet east of the Antelope, in the head of Silver Fork, Big Cottonwood cañon, Big Cottonwood mining district, claimed with all dips, spurs, angles, variations, metals, and minerals along the course of the ore wherever it may extend, together with all the privileges granted by the laws of the United States and the local laws of this district. Located August 6th, A. D. 1870. To be held jointly and undivided, discovery included. Claim 900 feet up the hill, and five hundred feet down the hill from discovery.

| | |
|---|---|
| "W. S. Hullinger, | John M. Davis, |
| "L. B. Clements, | H. C. Hullinger, |
| "A. Livingston, | A. D. Hullinger, |

"Wm. McGhie."

The application for patent describes the premises as follows:

"We * * * do claim fourteen hundred (1,400) feet in length by eighty-five (85) feet in width on the Wandering Boy lode, (being a silver-bearing vein of rock in place,) and the land and premises appertaining to said mine, * * * the location and extent thereof being more fully described as follows, to wit:

"The discovery-shaft is N. 17°, E. 1,928 feet from U. S. mineral monument No. 1, and about 70 feet southerly from the main shaft of the Prince of Wales lode at the head of Silver Fork cañon; thence S. 69°, W. 300 feet; thence S. 51° 30′, W. 200 feet to the southwesterly end of the vein, the shaft of the Highland Chief mine bearing northwesterly; return to discovery-shaft; thence N. 69°, E. 280 feet to summit of divide between Silver Fork and Honey-Comb cañons; thence N. 34° 30′, E. 620 feet to northeasterly end of mine."

In this case, as in the Prince of Wales, resort has been had to parol evidence to determine the location of the claim. Four deputy mineral surveyors and their four attendants swear that the location, application for patent, and final survey are for substantially the same premises, and I find from the testimony that their statements are true, and I therefore overrule this objection,

2. It is objected that the proof of publication does not state the last day of publication, and therefore does not show that the law was complied with.

The affidavit of Frank Kenyon, editor of the paper in which the notice was published, states that "the attached notice was published in the *Salt Lake Review for a period of ninety days*, commencing August 15, 1871." I think this was sufficient *prima facie* proof. The objection is overruled.

3. It is objected that the notice and diagram were not posted on the claim until five days after they were filed in the land-office, and five days after the publication had been commenced.

The proof shows that they were posted on the claim for more than ninety days, commencing on the 20th day of August, 1871. They should have been posted before the publication, but the omission was an irregularity only, and was not fatal.

4. It is alleged that upon a survey including an area of two acres an entry was made, and the two acres paid for, and that subsequently the survey was modified so as to include an area of 2 75–100 acres, and that a patent issued in accordance with the modified survey, without correction of certificate or payment for the $\frac{3}{4}$ of an acre.

This would result in depriving the Government of five dollars.

Perhaps it would be sufficient answer *de minimis non lex curat;* but as I understand the matter, the final survey, after deducting the premises belonging to the Prince of Wales and paid for by it, will leave just about two acres, which was the amount paid for by the Wandering Boy.

5. It is alleged that the patent issued without proof that the original locators were citizens of the United States.

It is not claimed that there was proof that the applicants for the patent were not citizens.

It has not been the practice of the land-office to require proof that the original locators were citizens, except in those cases where they were

the applicants for patent. It will not be presumed that they were not citizens, in the absence of any allegation or objection before the issuing of patent to that effect. After patent has actually issued, it is too late to make this objection. (Kempton case.)

6. It is objected that the patent illegally recites that the prior patent for the Highland Chief for the premises in conflict was inadvertently and erroneously issued.

I think that the patent to the Highland Chief for said premises did inadvertently and erroneously issue, and that it was proper to recite that fact and issue another patent to the Wandering Boy for said premises. (Stark *vs.* Starrs, 6 Wall., 402; Henshaw *vs.* Bissell, 18 do., 264.) But as counsel for the Highland Chief strenously contend that a second patent cannot properly issue, and as there can be no question about the right to proceed in the name of the United States to set aside a patent improperly granted, I have concluded to request the Attorney-General to institute such suits in behalf of the Prince of Wales and Wandering Boy.

I will notice, in passing, the objection that has been urged to the application in case of the last-named mine, on the ground that Moore & Co. had transferred all their interest in the mine to Walker *et al.* before this application was made.

I find from the exhibits before me that Moore & Co. still have some interest in seeing that the patent to the Wandering Boy is unclouded, and I think that interest sufficient to support their application.

THE ANTELOPE LODE.

The location of this lode was made on the 15th of June, 1870, and recorded June 18, 1870. It was as follows:

"The Antelope Lode.

"June 15, 1870. Miners' Notice.

"We, the undersigned, claim (3,000 ft.) three thousand feet in this ledge or lode, with all its dips, angles, spurs, and variations, to be known as the Antelope lode. Also (200 ft.) two hundred feet discovery, running (1,000 ft,) one thousand feet easterly, 2,000 westerly direction, situate at the head of the first south fork below mill known as Mill F, in the right-hand fork of said fork.

"Discovery.

"Levi H. North, Levi North, C. A. North, H. B. North, Marari North, E. H. Williams, H. B. Fuller, A. L. Fuller, R. Miller, A. Ivins, John M. Cook, John Cook, Wm. H. Homer, A. J. Alexander, W. S. Hullinger."

The application for patent was made on the 30th of December, 1873. Publication was made in the Salt Lake *Tribune*, commencing on the 4th of January, 1874. Messrs. Schenck and Mundy, the owners of the Wellington lode, filed, on the 4th of March, 1874, an adverse claim.

The case was heard by the Commissioner of the General Land Office in June, 1874, the parties being permitted to make oral and written arguments. On the 18th of August, 1874, the applicants for patent of the Antelope lode filed in the General Land Office an abandonment in writing of all that portion of their claim covered by the adverse claim of the

Wellington. The Commissioner thereafter treated the Wellington claim as out of the case, and thereupon informally decided that the applicants were entitled to patent, and on the 26th of August, 1874, a patent was issued for the Antelope lode, excluding the premises claimed by the Wellington. No notice of this decision was given to the owners of the Wellington or their attorneys. They claim that they should have had notice, and that they had the right of appeal to the Department, which right had been cut off by the neglect to give them notice and by the issuance of the patent. They allege that they desired to appear and protest against the issuing of patent to the claimants for sundry reasons, showing that the applicants had not fully complied with the law. They instance the following: That their location notice did not describe their claim as minutely as the local laws required, in that it did not name the starting point, and did not show that the locators marked their claim with stakes or hillocks, with the names of the claimants on a distinctly-written notice; that they failed to show that the locators had done twenty-five dollars' worth of work within ten days after recording their claim; that they failed to show that one of the locators (not one of the applicants) was a citizen of the United States; that the requisite amount of improvement and expenditure was not done on the claim, but was done on another—the Prince of Wales; that the notice and diagram were posted on the Prince of Wales instead of the Antelope; that they failed to show that the publication notice was given in a paper designated by the register; that no final survey of the claim, as patented, was made; that the claim was floated; and, over all and above all, that the filing of the adverse claim required that *all proceedings* should be suspended until after the judgment of the court had been rendered.

The Antelope lode, as originally located, covered a portion of the premises afterwards included in the patent to the Prince of Wales. Those portions of the claim not so included, and perhaps others, were patented to the Antelope claimants.

That there were irregularities in issuing the patent for the Antelope, I shall not deny. Some of them were of trivial importance, and others of a more grave character.

The question now presented is whether they were such as to require this Department to institute proceedings to set aside the patent. If any person was wronged by the issuing of the patent, it ought to be set aside.

If there are no adverse interests, then it seems to me that there is no good ground for interference with the patent. There is no pretence that any adverse interests have been injuriously affected except those of the Wellington claimants. It is argued that they have good ground to complain, that the 7th section of the act of May 10, 1872, required that all proceedings shall be stayed until the suit brought by the Wellington claimants has been acted upon by the courts.

This claim will require a careful examination of the statute and of the spirit or reason for the same.

The 7th section is as follows:

"That where an adverse claim shall be filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse

claim; and all proceedings except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of the adverse claim. After such judgment shall have been rendered, the party entitled to the possession, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general, that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceeding under the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear from the decision of the court to rightfully possess. If it shall appear from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

* * * * * * * *

This section expressly provides that when an adverse claim has been filed in the manner therein pointed out, "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." It requires the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to *determine the question of the right of possession to the premises* claimed adversely, and to prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of the adverse claim.

The object of this provision evidently is to *protect* the rights of the adverse claimant in the disputed premises and to determine the right of possession thereto, and to prevent the land department from issuing a patent for the premises in dispute to the wrong party.

Now, if the applicant for patent comes forward and says to the land department, "I concede that the adverse claimant has the better right, and I hereby give up all claim to the premises in controversy, and consent that they shall be excluded from my patent and included in the patent to the adverse claimant," what is to be gained by continuing the suit?

If it should proceed to final judgment it could only determine that the adverse claimant had the right of possession to the matter in dispute.

That result has already been accomplished by the waiver on file in

the Department. It is true that the words of the statute have not been *literally* followed, but the spirit has, and *hæret in litera, hæret in cortice.*

This principle has been well expressed by a learned court in the following language:

"It frequently becomes the duty of courts, in order to give effect to the manifest intention of the statute, to restrain, or qualify, or enlarge the ordinary meaning of the words that are used. The intention of the law-makers may be collected from the cause or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that a thing within the letter was not within the statute unless within its intention. The *letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter.*" (4 Bac., Title Stat. 1, §§ 38, 45, 50; Burgett *vs.* Burgett, 1 Ohio, 221.)

And again: "Courts are not to be confined to the letter of the law in giving a construction. The maxim, *hæret in litera, hæret in cortice,* is not to be forgotten. A statute must be construed with reference to the subject-matter of it, and its real object and true intent." (Spicer *vs.* Gesleman, 15 Ohio, 341.)

It seems to me that this Department is not required to await the action of the court when the thing to be accomplished by the action of the court has already been accomplished by the full admission of the adverse claim in the land department.

The abandonment in writing is a confession in favor of the adverse claimant, and if he should desire the benefit of a formal judgment of the court he has but to file therein a certified copy of the abandonment to obtain a judgment by confession.

I do not agree with the construction of this 7th section insisted upon by counsel for the motion. The only matter that could be legally presented to the court would be such as related to the premises in controversy. It would have no power to adjudicate upon anything else, and if it should undertake to do so its judgment in that regard would be *extra vires* and void. The mere fact of bringing the suit by the adverse claimant and obtaining a judgment in his favor does not necessarily give him a right to a patent by filing a certified copy of the judgment-roll and the certificate of the surveyor-general, and paying for the land and paying the fees. He may commence his suit immediately, and before the publication of notice has expired, during which other adverse claimants are allowed to file their claims. The statute requires that the publication of notice shall continue, and shall not be stayed. If during its publication other adverse claimants should appear and file their claims, after the suit has been brought by the first adverse claimant, it is very clear that the judgment in favor of the first applicant would not give him the right to a patent upon filing a certified copy of the judgment-roll, etc., and yet he would have complied with the letter of the law. It would be necessary for him to make all of the other adverse claimants parties to his suit before he could, as against them, claim the benefit of the statute. He could not in any other way satisfy the spirit of the statute, though he might the letter.

In the case under consideration the Wellington claimants will be deprived of no affirmative rights. They may go on with their suit and

obtain judgment, and file a certified copy of the judgment-roll, etc., and obtain their patent, but it will be for the premises in controversy only, and not for their entire claim. Congress, in my opinion, never intended that a patent should issue for any mineral lands where an application for patent had not first been advertised and notice given. If the Wellington claimants, by virtue of having filed their adverse claim to the Antelope, would be entitled to a patent for their entire claim, then they would acquire a patent for premises for the greater portion of which no notice of application had ever been given. A construction that would result in such consequences is wholly inadmissible.

I overrule the application to commence proceedings to set aside the patent for the Antelope lode. I shall request the Attorney-General to institute proceedings in the name of the United States to set aside and cancel so much of the patent to the Highland Chief as conflicts with the patents heretofore issued to the Prince of Wales and the Wandering Boy.

I have given to the many questions involved in this case all the consideration which my time would permit, and the conclusion which I have reached will result in bringing into court the owners of the Highland Chief, where they will have full opportunity to protect all their rights.

ERROR IN DESCRIPTION OF LAND CONVEYED BY A MINING-PATENT.

*Commissioner Burdett to Register and Receiver, Sacramento, California, June* 22, 1875.

Mr. Harkness' said placer-claim is erroneously described in said patent. It also appears that the said patent has been recorded in the recorder's office of Placer county, Cal.

I return said patent herewith, and you will inform Mr. Harkness that a new patent will issue to him for his said claim upon the receipt at this office of the inclosure, with a relinquishment indorsed thereon to the United States of the premises therein described, together with a certificate of said recorder that said relinquishment has been duly recorded in the records of his office.

The relinquishment should state that the same is made for the reason that the premises are erroneously described in said patent. The recorder's certificate should also state as to whether or not his records show any conveyance of said premises.

If Mr. Harkness has conveyed said premises to any other person, it will be necessary for him to cause an abstract of such conveyances to be made, certified to by said recorder, and accompanied with a relinquishment from the parties named in said conveyances, and to forward the same with the inclosure (the patent) to this office.

COLORADO RELOCATIONS.

*Commissioner Burdett to Register and Receiver, Central City, Colorado, June* 24, 1875.

In all cases of application for patents for mining-claims which are based upon relocations under provisions of the Territorial act of February 13, 1874, you will require the applicants to file with their application for patent a copy of the original notice of location of the mining-claim for which patent is sought, a complete abstract of conveyance

from the original locator to the parties making the relocation, and a copy of the relocation notice, together with an abstract of the conveyances from said relocators and their grantees to the applicant for patent.

LIMESTONE AND MARBLE.

*Commissioner Burdett to H. C. Rolfe, San Bernardino, Cal., June* 28, 1875.

Lands which are more valuable on account of deposits of limestone or marble than they are for purposes of agriculture may be patented under the mining acts of Congress.

KAOLINE.

*Commissioner Burdett to J. D. M. Crockwell, Salt Lake City, Utah, June* 28, 1875.

Lands containing valuable deposits of kaoline may be patented under the mining acts.

WHAT IS CONVEYED BY PLACER-PATENTS; EXCEPTING CLAUSES IN PLACER AND AGRICULTURAL PATENTS.

*Commissioner Burdett, to Hon. H. F. Page, Placerville, Cal., July* 29, 1875.

Placer-patents, except those issued under the provisions of the 11th section of the mining act, contain an excepting clause as follows, viz: "That should any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

By the terms of the act a patent for a placer-claim conveys "all valuable mineral and other deposits within the boundaries thereof," if no veins or lodes are claimed or known to exist within the exterior limits of the claim patented at the date of patent. In cases existing under the said eleventh section, the same excepting clause is inserted, with this exception, the word "other" is inserted after the word "any."

In all agricultural land patents the following clause is inserted, viz: "Subject to any vested and accrued water-rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water-rights as may be recognized and acknowledged by the local customs, laws, and decisions of courts, and also subject to the right of the proprietor of a vein or lode to extract and remove his ore therefrom, should the same be found to penetrate or intersect the premises hereby granted, as provided by law."

No title to a mining-claim can be secured under an agricultural land patent. (*Vide* section 2258, Revised Statutes.)

HEARINGS.

To determine the character of land.

*Commissioner Burdett to Register and Receiver, Pueblo, Colorado, August* 14, 1875.

It is observed that the published notices of hearings to disprove the

mineral character of land in your district are signed by the applicants themselves, who appear to make their own arrangements for hearing testimony and publishing notices.

This is not the correct practice.

The notice of the hearing should be prepared by the local officers and signed by them, in order to secure a correct description of the land and to insert the names of mineral affiants, should any mineral affidavits covering the land applied for be on file in your office.

You should designate the paper of general circulation near the land in which to publish the notice, and in all cases where practicable, the hearings should be held before you. Where distance or other good cause renders it advisable, you should designate an officer using a seal, or other person authorized to administer oaths, whose character is known to you, residing near the land, as the proper person before whom the hearing shall be held.

The testimony submitted should be as far as possible by questions and answers, and the officer by whom the testimony is taken should endeavor to elicit full information as to the mineral and agricultural qualities of each ten-acre tract of the claim.

SEVERAL LODE-CLAIMS CANNOT BE EMBRACED IN ONE APPLICATION.

*Commissioner Burdett to Register and Receiver, Helena, Montana, August* 17, 1875.

Several lode-claims separate in their inception should not be embraced in one application for patent.

The slight saving in expense does not compensate for the delays in furnishing satisfactory proofs in the several claims sought to be patented, and the practice of including several lodes in one application should not be encouraged.

This decision does not apply to placers which embrace several lodes within the boundaries sought to be patented, (*vide* section 11, of the act of May 10, 1872, Revised Statutes, section 2333,) or to consolidated claims on the same vein or lode.

RIGHTS OF FOREIGN CORPORATIONS UNDER UNITED STATES MINING PATENTS.

*Commissioner Burdett to Register and Receiver, Central City, Colorado, Oct.* 8, 1875.

This office is in receipt of a letter from William W. Ramage, agent and manager for the assignees of J. W. Haseltine *et al.*, patentees of the Searle lode, wherein he states that you refused to allow him to file a plea against the application of Joshua S. Reynolds for patent for the Aduddell lode, on the ground that said assignees were a foreign corporation.

To prevent misunderstanding on this important question, I have to call your attention to section 2326 of the Revised Statutes, wherein the following language is used: "Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever." A foreign corporation purchasing a patent issued to citizens of the United States, takes all the rights, and is entitled to all the privileges that would have accrued to the original patentees, had they retained their interest in the mine. You will

therefore treat the agent of such foreign corporation precisely as you would the patentee, so far as rights are concerned under the United States patent.

Ordinarily, a few words of explanation will convince the holder under a patent, that a plea or adverse claim is unnecessary where a survey for another lode crosses his own premises, as the ground in conflict is already patented to him, and will be excepted from the patent issued under the subsequent application. Should the patentee persist in filing an adverse claim, you will receive it, and give him the usual notice in writing that the same is rejected on the grounds above recited, when he may appeal to this office if he desires to do so.

But this is not an ordinary case. From the letters of Mr. Ramage, it appears that the premises conveyed by the patent to the Searle lode are incorrectly described therein; that the land conveyed lies considerably east of that claimed by his assignors. It becomes his duty, therefore, to protest against the issuance of a patent on a conflicting survey until a second patent is issued for the Searle lode, correctly describing the claim. You are therefore directed to receive such plea or protest as Mr. Ramage may desire to file in the Aduddell application, and transmit the same to this office, with the other papers in the case, after the entry has been perfected, as usual.

MILL-SITES AND TIMBER.

*Commissioner Burdett to E. T. George, Lander County, Nevada, Oct.* 21, 1875.

Mill-sites may be located under the provisions of the mining act, and if located should be recorded.

Locators of mining-claims, their heirs and assigns, have the exclusive right of possession of the surface-ground included within the lines of their locations, upon compliance with the laws of the United States and with the State, Territorial, and local regulations governing their possessory titles, where no adverse claim thereto existed on the 10th of May, 1872.

The parties having the right of possession to the surface have also the right of possession to the timber growing thereon.

EQUATOR LODE.

Fourteen hundred feet on a lode in Colorado were located by three persons Oct. 31, 1866; relocated June 11, 1867, by the same parties, with sixteen hundred feet additional, and the three thousand feet relocated Sept. 7, 1869, by fourteen persons: *Held*, that the last location was good, and the applicants, being the assignees of the first, second, and third locators, have a good title.

An adverse claim to be considered must be filed during the period of publication.

An error in the description of a claim making the published notice inconsistent with itself should put an adverse claimant on his guard, and will not be deemed fatal unless it is capable of misleading.

A conflicting survey already patented cannot as an adverse claim delay an application for patent, but the ground in conflict will be excluded from a subsequent patent.

*Commissioner Burdett to Register and Receiver, Central City, Col., October* 26, 1875.

On the 14th May, 1869, the Equator Mining and Smelting Company filed in your office an application for patent for fourteen hundred linear feet of the Equatorlode, Col.

Against this application for patent the Bowman Silver Mining Company filed an adverse claim on the 11th August, 1869, and withdrew the same on the 15th July, 1874.

On the 13th August, 1869, Samuel I. Nash *et al.* filed an adverse claim against said application, but as the same was not filed within the period of publication of notice of intention to apply for a patent, the same cannot be considered.

On the 20th April, 1875, the Marshall Silver Mining Company of Georgetown, by its attorney, William A. Arnold, filed a protest against said application for patent, for the following reasons:

1st. That said applicant has not the title to said fourteen hundred feet of the Equator lode.

The copies of the location certificates of the Equator lode show that on the 28th July, 1866, John Turck and two others discovered said lode and made record of their location on the 31st October, 1866, claiming 1,400 feet. On the 11th June, 1867, the same parties located 3,000 feet of said lode, and made record thereof.

In the location notice and record it is stated that "said lode was discovered in July, 1866, and recorded under the Territorial law in October."

On the 30th July, 1867, the two parties who had joined with John Turck in the location of this lode sold their interests to John J. Simmons, Henry H. Porter, and William O. Carpenter.

On the 7th September, 1869, Turck, Porter, Simmons, Carpenter, and ten others located three thousand feet of said lode and made record of such location.

All the locators hereinbefore referred to, and their grantees, had conveyed all of their respective interests to said company prior to the application for patent.

The company's title by the record is shown to be perfect.

No one could have been misled by this notice. If in any doubt in regard to the length of the claim, a party could satisfy himself upon this matter by calling at the local office; for the same notice which contained this discrepancy stated "that the claim is more fully described upon the diagrams and notices thereof filed this day in this office." (The local land-office.)

The diagram and notice posted in the register's office are posted upon the same sheet of paper.

The sum of the distances along the vein as shown upon the diagrams, to wit, 178½, 350, and 871 feet, is 1,399½ feet.

The notice states that the claim is "fourteen hundred feet in length," and gives the courses and distances along the vein.

The sum of the distances given in the notice, to wit, 187½, 350, and 871½ feet, is *fourteen hundred and nine feet.*

The smallest number of feet called for in either the notice, diagram, or published notice, is *thirteen hundred and ninety-nine and one-half feet.*

The claim as finally surveyed along the centre line is *thirteen hundred* and ninety-nine and four hundred and seventy-five thousandths feet, or twenty-five thousandths of a foot less than the smallest number of feet called for in either of said documents,

2d. It is objected that the survey made for the Equator lode em-

braces two hundred square feet of the surface-ground embraced by the survey made for the Reynolds lode.

No adverse claim was asserted by the Reynolds lode claimants against the application for patent for the Equator claim within the time prescribed by law, and none can be considered filed after the expiration of the period of publication.

3d. It is objected that the published notice, the diagram, and the notices posted upon the claim and in the register's office do not agree.

Each one of these papers describes the claim as commencing at a point south 49° west from the shaft upon the Winnebago lode at the distance of fifty-six and one-half feet; the *courses* agree in all these papers. The application for patent, the notices posted and published, all give the length of the claim as fourteen hundred feet.

The published notice, after giving the length of the claim as fourteen hundred feet, describes the premises as commencing 56½ feet S. 49° W. from the Winnebago shaft. Thence S. 49° W. *eighteen hundred and seventy-two feet.* Thence S. 51° W. 350 feet, thence S. 54° W. 871½ feet to "western boundary, embracing a surface-claim of 70,000 square feet, and is more fully described upon the diagrams and notices thereof filed this day in this office, and to be posted upon the claim itself."

The sum of the distances, as given above, along the vein, to wit: 1,872, 350, and 871½ feet, are *three thousand and ninety-three and a half feet,* although in the same notice it is stated that the claim is only *fourteen hundred feet in length.*

I am of the opinion that sufficient notice was given in this case.

On the 31st of May, 1875, Wm. P. Linn, by his attorney, Wm. A. Arnold, filed a protest against said application, for the reason that the survey of the Equator claim conflicts with and embraces a portion of the survey made for the Colorado Central lode.

It appears from the records of this office that an application for patent for the Colorado Central lode was filed in your office on the 7th February, 1873, and that an adverse claim was filed against the same by the Equator claimants.

It also appears that the Equator claimants were nonsuited upon the trial of the suit brought upon said adverse claim.

On the 21st July, 1875, patent issued for the Colorado Central lode.

When patent issues for the Equator claim it will be necessary to insert in such patent a clause excepting from the conveyance the surface-ground already patented to the Colorado Central claimants.

You will, upon the receipt hereof, allow the entry of said Equator claim, and forward the register's certificate of entry and the receiver's receipt to this office.

PLACER-MINE.

An unincorporated association of citizens owning separate and distinct interests in a placer-mine may unite their means, and expend the five hundred dollars required by the mining laws at one point, and thereafter secure patent from the United States.

Certain proofs required under the mining laws detailed.

*Commissioner Burdett to Register and Receiver, Elko, Nevada, October* 28, 1875.

With your letter of the 11th ultimo you submitted the papers in case

of the application of Dudley Chase and nine others for patent, for certain placer-mining ground.

It appears from the papers in the case that the several applicants own separate and distinct interests; that the said applicants are an association of persons unincorporated; that the required amount has been expended upon this claim at the joint expense of the several members of said association.

An application for patent may be filed by an association of two or more persons owning divided or undivided interests in the premises for which patent is sought, and where the required improvements have been made upon the premises described in the application, jointly by the several owners, the said association of persons may receive patent therefor upon full compliance with the law and instructions.

In the case under consideration you will call upon the applicants to furnish the following additional evidence:

1st. The affidavit of the applicants as to whether or not any known veins or lodes of gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, exist within the exterior boundaries of said premises. If any are known to exist, their names must be given, and the affidavits must show that no other known veins exist within the said premises other than those named.

2d. The applicants must file an abstract of conveyances from the original locators to the present applicants, properly certified to by the recorder.

Copies of the several locations have been filed.

3d. Evidence must be filed to show that Thomas M. Lucus, before whom some of the proofs submitted were verified, was a justice of the peace.

PROCEEDINGS WHERE PART OF A MINING-CLAIM IS IN ONE LAND-DISTRICT AND PART IN ANOTHER.

*Commissioner Burdett to Register and Receiver, San Francisco, Cal., November* 12, 1875.

In all cases where mining-claims lie partly in one land-district and partly in another, applications for patents therefor should be filed in that district where the principal workings of the claim are situated, as shown by the plat and field-notes; and the diagrams and notices should be posted near to such workings. A copy of the notice and of the diagram should be posted in the register's office in each district.

The notice posted in the office of the register where the *application for patent is not filed*, should state where the application for patent for the premises therein described has been filed, and the date of the filing of such application.

PORTERFIELD WARRANT.

Porterfield warrants cannot be located on lands appropriated by law, or which exceed in price $1.25 per acre.

Title to land, in this case, did not pass with the patenting of an improper location of a Porterfield warrant; for a mining claim was located thereon at date of location, and the land was not subject to location with said warrant.

Rightful owners of this mining claim will be allowed to secure patents for their mine upon compliance with the mining law.

*Commissioner Burdett to A. V. Weise, Salt Lake City, Utah, December* 1, 1875.

The act of Congress approved April 11th, 1860, entitled "An act for the relief of the legal representatives of Charles Porterfield, deceased," authorized the issuance of warrants equal to six thousand one hundred and thirty-three acres of land, to be by them located upon any of the public lands *which have* not been otherwise appropriated at the time of such location within any of the States or Territories of the United States where the minimum price for the same shall not exceed the sum of one dollar and twenty-five cents per acre.

From the foregoing it will be seen that Porterfield scrip could not be located upon any land which had been regularly appropriated by virtue of the provisions of law for its disposition. Nor upon land the minimum price of which exceeded one dollar and twenty-five cents per acre.

It appears from the records of this office that on the 2d April, 1873, Henry Carrigan located Porterfield warrants, No. 93 upon the N.W. ¼ of S.W. ¼ Sec. 20, T. 25 S., R. 6 W., Utah, and No. 94 upon the S.W. ¼ of S.W. ¼ of said section.

Patents issued to said Carrigan for said tracts on the 13th June, 1873.

In your letter you state that you are the grantee of the parties who purchased Carrigan's interest in said tracts.

You also state that on the 10th of June, 1872, the Excelsior Sulphur Mine was located upon said tracts by J. M. Moore *et al.*, and duly recorded; and that you now hold the said mine by purchase from the locators and their grantees.

In view of these facts, you ask whether you have government title to said mine.

This mining-claim having been duly located and recorded in accordance with the provisions of the mining act of May 10, 1872, nearly a year prior to the location of said warrants, the land embraced by said mining location had been so appropriated that the same could not legally be located by said warrants. Aside from this, the land being mineral land, the minimum price of which exceeds one dollar and twenty-five cents per acre, could not be legally located by the said warrants.

No title was or could be obtained by said warrant locations, and the patents issued thereon will be cancelled upon their return to this office.

Should you or other parties holding the possession and the right of possession to said mining land desire to secure patents therefor, it will be necessary to proceed under the mining acts of Congress.

MICA.

**The question, can land, containing valuable deposits of mica enuring, if agricultural, to the Union Pacific Railroad, be patented under the mining law? was answered as below.**

*Commissioner Burdett to William A. Arnold, Central City, Colorado, December* 3, 1875.

Lands containing valuable deposits of mica may be patented under the provisions of the mining act of May 10, 1872, upon full compliance with the law and instructions.

From the operations of the grants to the different railroad companies are excepted all *mineral lands*, except those containing coal and iron, and title to mineral lands can only be acquired under said mining acts.

HEARINGS—SURVEYOR'S RETURN.

*Commissioner Burdett to Register and Receiver, Boise City, Idaho, Dec.* 22, 1875.

In contests to determine the character of land, any person who has a knowledge thereof, whether he has an interest therein or not, is permitted to appear and testify in behalf of the surveyor's return.

TOWNSITE OF CENTRAL CITY, COLORADO.

The following excepting clause will be inserted in patents for townsites in mining regions, without mentioning by name or number any patented mining-claim within such townsites:

"*Provided*, That no title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining-claim or possession held under existing laws: *And provided further*, That the grant hereby made, is held and declared to be subject to all the conditions, limitations and restrictions contained in section two thousand three hundred and eighty-six of the Revised Statutes of the United States, so far as the same are applicable thereto."

The townsite laws clearly contemplate towns and cities in mining regions, and permit townsite entries on mineral lands.

Mining-claims within townsites are patented with an excepting clause, as follows:

"Excepting and excluding, however, from these presents, all town-property rights upon the surface, and there are hereby expressly excepted and excluded from the same, all houses, buildings, structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above described premises, not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession and enjoyment of the same."

*Commissioner Burdett to Register and Receiver, Central City, Colorado, December* 23, 1875.

Townsite entry, No. 211, of Central City, made May 27, 1874, amendatory of entry No. 148, made May 16, 1873, has this day been approved, and patent will issue therefor in due course, but with a proviso in the following form: "*Provided*, That no title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining-claim or possession, held under existing laws: *And provided further*, That the grant hereby made is held and declared to be subject to all the conditions, limitations, and restrictions contained in section two thousand three hundred and eighty-six of the Revised Statutes of the United States, so far as the same are applicable thereto."

Section 2386, above quoted, is in the following words: "Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired, shall be subject to such recognized possession, and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes, as against the United States."

On behalf of certain alleged mining interests, John A. Dix, Esq., *et al.*, protest against the issue of patent to the town unless the following exception, or one equivalent thereto, is inserted therein, to wit: "*Provided*, That no title shall be acquired under this patent to any mine of gold, silver, cinnabar, or copper, nor to any surface-ground over any such mine or within fifty feet on each side of the same throughout the length of the vein, which said surface-ground shall be reserved, and shall be sold to the mines for the special use and working thereof, at not less than —— dollars per acre."

I am of the opinion that this form of exception is objectionable, that it is not in conformity with law, and that its insertion would tend to cloud the title of the grantees under the town patent, without assuring or securing to mineral claimants the particular benefits or privileges evidently intended to be compassed by its terms. It is to be borne in mind that this office is not vested with a discretionary authority in the matter of the disposal of the public lands. It can neither grant without express authority of law, nor can it limit or qualify by form of conveyance the substance, conditions or extent of the subject-matter granted, save as the same may be authorized to be done by express legislation. The proviso proposed by this office to be inserted and above quoted, embraces by recitation and reference all that Congress has seen fit to enact by way of qualification in the matter under consideration, contains all of that to which appeal can be had should the courts be applied to for the settlement of conflicting claims, and must, therefore, be held to be the limit of Executive authority.

The townsite laws clearly contemplate that towns will exist in mining localities; by clear implication, townsite entries are to be permitted on mineral lands. This is indicated by the clause excepting title to mines from the title acquired by the town. It is inevitable that where the surface is suitable it will, in a mining vicinity, be populated and attain the character of a town or city. Where any branch of business flourishes, there capital and population will concentrate. The various trades and callings will centre there. Hotels will be a necessity. Dwellings will be built and permanent homes established; all the various interests which constitute valuable property rights as connected with the soil will be created. And this is not necessarily antagonistic to the miners. The protection of municipal government is in the miner's interest, as it is in the interest of any other class of business men.

In the case of Theodore H. Becker *vs.* Citizens of Central City, Colorado, Becker was a mineral claimant to 3,000 linear feet of the Gunnell Extension or White lode, under act of July 26, 1866. He claimed compliance with the law, and was opposed by certain citizens of the town, who represented that said lode extended to a considerable distance under town lots and improvements owned and occupied by them in said city. In this case the Hon. Secretary of the Interior decided, August 7, 1871, that "In the present case the application for a patent includes the surface and soil as well as the mineral. I am of the opinion that the persons in possession of this surface are adverse claimants within the meaning of this law, and are entitled to be heard in the local courts before a patent is issued." The exception in the mining-patents, for claims within the exterior limits of a town, having in view the legality of the possession of the surface-ground by the inhabitants, is as follows, to wit: "Excepting and excluding, however, from these presents all town property rights upon the surface, and there are hereby expressly excepted and excluded from the same, all houses, buildings, and structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above-described premises, not belonging to the grantees herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same." By this exception the surface in the actual possession and occupation of the mine-owner,

or covered by his improvements, is as distinctly assured and conveyed to him, as is that surface to which town-property rights have attached, or on which improvements by other parties have been placed, excepted from his patent. I regard these correlative exceptions, inserted in the townsite and mineral patents, as securing the object contemplated in the townsite and mineral laws. They assure to all parties just what, under the law, they are respectively entitled to claim. To grant to the miner the entire surface-ground, along the whole line of the lode, with a width of one hundred feet, without regard to the acquired surface rights of others, would compel me to ignore the principle announced in said decisions of the Hon. Secretary, as well as to do violence to my own judgment of the proper construction of the two laws under consideration. They must be so construed that both may stand. Under the system established as aforesaid, of inserting said exceptions in the patents to towns and mine-owners, there are no occupants in Central City presenting their claims adversely in the manner provided in the mining statutes, and for the reason that, by said exceptions, the rights of all parties are respected and so defined that they are easily susceptible of definite ascertainment. To except from the town patent definite surveys of mineral claims, initiated or extended after surface occupation by other parties, would obviously be ignoring, to an unjustifiable extent, adverse *rights* which have not been presented for adjustment by the courts, prior to the mineral entry, simply for the reason that under the practice of this office, indicated by said exceptions, it was wholly unnecessary. This non-action was based on the practice of this office, on which they had the right to rely, and no power to control, and this practice itself was based on the reasonable and essentially necessary construction of the townsite and mineral laws, whereby both might be executed, and claimants under them secured in such rights as they had respectively acquired. It should also be remembered, in this connection, that the government does not act upon the individual claims of town occupants, but does adjust and patent mineral claims directly to the mine-owners.

The request of the mineral claimants, however, as presented in their protest and claim now under consideration, constitutes a proposition never hitherto before this office for decision. It is in brief, that every mine discovered, or hereafter to be discovered, throughout its entire length, with a width of one hundred feet, surface-ground included, be excepted from the town patent.

Where and when will these mines be discovered and opened? What and whose property will they then embrace and practically confiscate? What foot of surface-ground will ever be held by a town occupant under a clear title, where the same is not purchased from the mine owner? Was the mineral law designed by Congress as a repeal of the townsite statutes? These points would assume vital significance were the present claim conceded.

The town of Central City was incorporated in 1864. The first patents were issued to mine owners in 1869, Precisely *when* mining claims attached to any particular piece of ground I cannot determine. Precisely *when* a legal surface claim by a town occupant attached to any particular lot I have no means of ascertaining. How, then, with defer-

ence to those laws under which these claims have attached, can I defer the one absolutely to the other.

The necessity of so construing both laws as not to defeat either; that respect for rights under each, which, of itself, it seems, must control my action; the fact that the exceptions in mineral patents secure a shield of protection to town occupants and mineral claimants alike, and on which town occupants have relied, and that the exception in the townsite patent is as broad as the law suggests, and almost in its exact language, render it improper for me to grant the present claim.

The mine owner is protected by the local rules and customs, and these are recognized by the United States. The town patent is executed to a trustee, who is controlled by the legislature of his State or Territory. The local courts are open for those particular adjustments which this office cannot reach; and I conclude that the present demand is entirely outside what, in the proper execution of said laws, can be legitimately claimed or conceded. I therefore decline to grant the application; and in conformity to the views herein set forth, I hereby revoke my letters to the register and receiver, of August 26th, 1874, and to John A. Dix, Esq., of April 24th, 1875, so far as they conflict with this decision, and decline to except by name and survey any mine whatever in said town.

H. W. R. CROUCH.

**Where land is of little, if any, value for agricultural purposes, but is essential to the proper development of mining claims, it should be withheld from sale under the laws regulating the disposal of agricultural lands and be disposed of only under the mining acts.**

*Commissioner Burdett to Register and Receiver, Marysville, Cal., Jan. 3, 1876.*

The testimony submitted at the hearing [to determine the agricultural or mineral character of the land] establishes the fact that the land is of little value for agricultural purposes, and that it is bounded on the south by valuable gold-bearing gravel mines or deep hydraulic diggings, which can be successfully worked and developed only by means of tunnels passing through this land to Deer Creek, which is the only natural and practicable outlet for these mines.

It is shown that portions of the land in dispute are claimed and held by mine owners, and that several tunnels are now being run through this land for the purpose of developing and working said gravel mines.

It also appears that Mr. Crouch has conveyed by deed to the Mooney Flat Hydraulic Mining Company certain mining rights upon the land in dispute, and that he acknowledges the mineral character of the S. ½ of S. ½ of the N.W. ¼ of the N.W. ¼ of said section.

The testimony in this case forces upon my mind the conclusion that this land is only valuable on account of its location with reference to said mining-claims, and that it is of far greater value for mining purposes than for agricultural purposes.

Mines only become valuable when they can be developed and the precious metals extracted; and in cases of this kind, where the land is of little, if any, value for agricultural purposes, and is essential to the proper working of deep gravel mines, it should be withheld from sale under the laws regulating the disposal of agricultural lands, and disposed

of only to such parties as may be entitled to the same under the mining acts of Congress.

In the case under consideration, the land will be withheld from sale as agricultural land.

DEPUTY.

*Acting Commissioner Lippincott to Register and Receiver, Salt Lake City, Utah, January* 27, 1876.

Several papers have been received from your office which appear to have been sworn to before "Oliver A. Patton, register, per A. D. Wheeler, deputy."

Neither the register nor receiver has authority to deputize any person to administer oaths; and papers sworn to before any person purporting to act as deputy for either the register or receiver, cannot be received as evidence.

NERCE VALLE.

Sioux half-breed scrip cannot be located on mineral lands, and titles thereto cannot be secured except on compliance with the mining acts of Congress.

The kind of land Sioux half-breed scrip may be located upon.

*Acting Commissioner Lippincott to Hon. L. V. Bogy, U. S. Senate, February* 23, 1876.

The act of July 17, 1854, authorizing the issuance of Sioux half-breed scrip, provides that said scrip may be located upon certain lands within their reservation, "or upon any other unoccupied lands subject to pre-emption or private sale, or upon any other unsurveyed lands not reserved by government, upon which they have respectively made improvements."

Mineral lands are not subject to pre-emption or private entry, but on the contrary are reserved for sale to parties showing compliance with the mining acts of Congress.

Lands which are mineral in character cannot therefore be entered with Sioux half-breed scrip.

PUBLISHED NOTICES.

*Acting Commissioner Lippincott to Register and Receiver, Central City, Colorado, March* 7, 1876.

I have to direct that published notices in mining applications be numbered to correspond with the record of applications in your office, and instead of being headed as at present: "Lode Notice," etc., the words, "Mining Application, No. ——," be used, inserting the number of the application.

EVANS *vs.* RENDALL.

The decision of a court of competent jurisdiction that an adverse claimant to certain mineral lands in dispute has no right, title, or interest therein is final as to his rights thereto.

Such adverse claimant is estopped from alleging that the land so claimed as mineral land is of a different character.

*Secretary Z. Chandler to Commissioner Burdett, March* 23, 1876.

From the papers transmitted in this case, it appears that on the 21st of March, 1872, Rendall made an application at the local office for a patent of certain lands as mineral lands on sections 34 and 35 in said town-

ship, including those in dispute; that on the same day Evans made an application at said office for a patent of the N.W. ¼ of the S.W. ¼ of said section, claiming adversely to Rendall; and that thereupon an order of suspension was issued to Evans, and their applications, with others claiming adversely to Rendall, were duly certified to your office.

In your decision of October 22, 1873, you held that Evans' application was "sufficient as a *prima facie* adverse showing," and that it would be necessary for him to commence suit in a court of competent jurisdiction to determine his right to the possession of the land in dispute within thirty days after receiving notice of your decision.

It further appears that, in accordance with your decision, Evans subsequently commenced an action against Rendall in the district court in which said land is situated, to have his rights thereto determined, and that at the trial had in said cause it was adjudged that he had no right, title, or interest therein.

Since said trial and decision Evans has filed a petition, accompanied with affidavits tending to show that the land is agricultural and not mineral, alleging that Rendall fraudulently seeks to obtain it from him, and asks to have the case reopened and the character of the land determined.

Rendall has filed counter affidavits, showing the mineral character of the land, his continual occupation thereof, and mining improvements thereon, valued at four thousand dollars.

I am of the opinion that Evans having once sought to obtain this land as mineral land, adversely to Rendall, is estopped from alleging it to be of a different character; and that the decision of the court having jurisdiction of the case, that he has no right, title, or interest herein, must be considered final as to his rights thereto.

BECKNER *et al. vs.* COATES.

Aliens cannot hold a mining-claim prior to the issuance of patent therefor. An assignor can transfer no greater interest to his assignee than he himself possesses, and the purchaser from aliens of an unpatented mine acquires no title thereto.

Such purchaser may relocate the claim, and thereby acquire a possessory title upon compliance with the local and Congressional laws.

*Acting Commissioner U. J. Baxter to Register and Receiver, Roseburg, Oregon, April* 24, 1876.

Mr. Coates alleges that he came into possession of said premises by purchase on the 23d of September, 1875, from Su Hang, Shi Quong, Wong Chung, Shi Shoon, Ah Woo, and Wong Loong. He does not allege or show that he had any right, title, or interest in said premises previous to the date of said deed from said Chinamen.

No title in mining-claims can be held by aliens prior to the issuance of patents therefor.

At the time said aliens claimed said premises, they could not, under the law, hold title to the same, and having no authority of law for laying claim to said premises, they could transfer no title to Mr. Coates for the same.

An assignor can transfer no greater interest to his assignee than he himself possesses.

In case of the application for patent for the Kempton mine, the Hon.

Secretary of the Interior held that "if therefore it appeared in the case that the original locators were not citizens, or had not declared their intention to become such at the time their location was made, and that they had not become citizens when they transferred the mine, I should have no hesitation in holding that the transfer was invalid and the claim of the applicants was not good."

Had Mr. Coates, after said purchase, made a relocation of said mine, made the required improvements and otherwise complied with the law, he would have been in condition to apply for a patent. But none of these points are shown or alleged.

Said application for patent is accordingly rejected.

LEGAL SUBDIVISIONS.

*Acting Commissioner Baxter to Register and Receiver, Shasta, California, April* 24, 1876.

There is no law authorizing the sale of quartz claims by legal subdivision.

PUBLICATION OF NOTICE.

Where the register designates the daily issue of a newspaper for publication of notice of a mining application for patent, it is not a compliance with law to change to to the weekly edition of the same paper without authority of the register.

*Acting Commissioner Baxter to Register and Receiver, Helena, Montana, April* 29, 1876.

On the 27th December, 1875, Charles W. Cannon, Catharine B. Cannon, and Henry Cannon filed in your office an application for patent for the N.W. ¼ of section 25, T. 10 N., R. 4. W., Montana; and on the same day the register ordered the publication of the notice in "the Helena *Herald*, a newspaper published daily at Helena, Montana."

By the affidavit of Andrew J. Fisk, one of the publishers of the Helena *Herald*, daily and weekly edition, it is shown that said notice was inserted in the Helena *Daily Herald* on the 28th of December, A. D. 1875, and continued to be published therein on the 29th, 30th, and 31st of the same month; "that on the 3d day of January, A. D. 1876, at the request of C. W. Cannon, one of the parties named in said annexed notice; said annexed notice was ordered by said Charles W. Cannon to be changed from the *Daily Herald*, and to be published in the *Weekly Herald*, which said notice by the order of Charles Cannon was so changed from the daily to the weekly *Herald*, and the first insertion of said notice being published in the *Weekly Herald* on the 6th day of January, 1876, and the last notice in said *Weekly Herald* on the 2d day of March, A. D. 1876."

In view of these facts, the question is presented whether said notice was published in the manner and for the length of time prescribed by the statute.

The sixth section of the mining act of May 10, 1872, Revised Statutes, section 2325, provides: "That the register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days in a newspaper to be by him designated as published nearest to said claim."

In the case under consideration the register directed the notice to be

published in the *Daily Herald* for sixty days. The notice was published in said paper only on the 28th, 29th, 30th, and 31st of December—four insertions.

The notice was then discontinued in the *Daily Herald* by instruction of C. W. Cannon, and inserted in the *Weekly Herald*. In the *Weekly Herald* the notice was inserted from the 6th January to the 2d March, 1876.

In case of Jenny Lind Mining Company *et al. vs.* Eureka Mining Company, the Hon. Secretary of the Interior held that in estimating the sixty days of publication required by the act of May 10, 1872, the first day of publication should be excluded and the last included.

In the case of J. H. McMurdy *et al. vs.* E. S. Streeter *et al.*, the Hon. Secretary of the Interior held that "the time elapsing between the first and the last insertion must include the full period of sixty days." From the 6th of January to the 2d March, excluding the first day, is only fifty-six days; the publication, therefore, in the *Weekly Herald* was not sufficient, even though the notice had been inserted therein by direction of the register.

From the foregoing it will be seen that the applicants have not given sufficient notice by publication, having published the notice for four days only in the paper designated by the officers to whom the law has delegated the power to authorize the publication of notices in case of applications for patent for mining-claims.

The second notice was inserted in the *Weekly Herald* without authority of the register, and for fifty-six days only.

The statute having in this material requirement been disregarded the publication as made, and all subsequent proceedings founded upon it were irregular and invalid. Said application for patent is accordingly rejected.

### DECEASED LOCATOR.

#### Proof of transfer of title.

*Acting Commissioner Baxter to A. Morrell, Washington, D. C., April 29, 1876.*

In case of North East Extension of the Yosemite Mine—Mineral Entry No. 113, Carson City District, Nevada—it appears by the abstract of title that D. H. Crowe was one of the locators; and it also appears that the applicant for patent claims title to said mine under a deed dated December 29, 1873, signed by the other locators, and by Jas. T. Maclean as "executor of the estate of D. H. Crowe, deceased."

By a certified copy of the letters testamentary, issued August 22, 1871, from the probate court, city and county of San Francisco, California, in the matter of the last will and testament of David Holmes Crowe, deceased, it appears that James T. Maclean and Barry Baldwin were on that date appointed executors of the estate of said Crowe. No copy of said will is attached to said letters.

It also appears by a certificate of the clerk of said court, dated 8th April, 1874, that said letters have been revoked, but the certificate fails to show the date of such revocation.

The applicant should file a certified copy of the letters testamentary, with copy of will attached; a certificate of said clerk, showing the date

of said revocation, and evidence that *one* of said executors could legally pass title by deed.

OMAHA QUARTZ MINE.

**The local land officers have no authority of law to receive and place on file any adverse claim to a mining application until the legal fees for such filing have been paid in full by the adverse claimants.**

**An adverse claim, in other respects in due form, received by mail before the expiration of publication of notice, but on which the fees for filing were not paid until after the expiration of such publication, will be treated simply as a protest for the purpose of showing from the record that the applicant has failed to comply with the mining act.**

**Where the evidence on behalf of the applicant is clear and specific as to the conspicuous posting of notice and diagram on the claim for the period required by law, such evidence will be deemed satisfactory, even though allegations to the contrary are made by the protestants.**

*Acting Commissioner Baxter to Register and Receiver, Sacramento, California, May* 12, 1876.

On the 26th of August, 1875, the Omaha Gold Mining Company filed in your office an application for patent for the Omaha quartz mine.

The notice was published in the Nevada *Transcript* on the 1st of September, 1875, and for the full period of time required by law.

On the 28th of October, 1875, and before the expiration of the sixty days' notice by publication, you received by express, from John H. Foley, Patrick Ryan and J. M. Foley, certain papers intended as an adverse claim against said application; but as the fees for filing an adverse claim did not accompany said papers, you refused to place them on file.

The twelfth section of the mining act of May 10th, 1872, provides that the fees for filing and acting upon each adverse claim shall be five dollars for the register and a like amount to the receiver.

The 80th paragraph of circular instructions from this office under said act, provides that the fees should be paid at the time of filing the adverse claim. An adverse claim cannot be considered as filed until the party who desires to assert an adverse claim against an application for patent has performed all the acts required of him by the statute.

The local officers are required to report to the Commissioner of the General Land Office the amounts received for filing and acting upon adverse claims, and to place said sums to the credit of the United States, and they have no authority of law to receive and place on file any adverse claims until the legal fees for such filings have been paid in full.

Parties who fail to comply with the plain and positive requirements of the law in asserting their adverse claims, cannot thereby prejudice the rights of applicants who strictly comply with the requirements of the statute.

In the case under consideration, after said papers had been received, and on the succeeding day, you telegraphed to J. M Foley that the papers had been received without the fees, and instructed him to send the fees, or you could not file the adverse claim.

Two days still remained within which said adverse claimants might have completed their case; but the required fees were not transmitted until the 5th of November, five days after the expiration of the sixty days' notice by publication, and after the period within which adverse claims must be filed; and for this reason said papers cannot be considered as an *adverse claim.*

The sixth section of said mining act provides that "if no adverse claim shall have been filed with the register and receiver of the proper land-office, at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, * * and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act."

This filing can only be considered as a protest and for the purpose of showing that the applicant has failed to comply with the mining act.

The said Foley *et al.* allege that the notice was not duly published, having been published in the Nevada *Transcript*, Nevada City, Cal., instead of in the Grass Valley *Union*, published at Grass Valley, Cal., and that the notice and diagram were not posted *conspicuously* upon the claim. [For question of publication see page 198.]

By the affidavits of M. Dodsworth, superintendent of said Omaha mine, and eighteen other persons, it is shown that the notice and diagram were posted in the most conspicuous place upon said claim, near the centre thereof, upon a prominent point, about eight feet south of the main traveled trail leading across said mine, and that said notice and diagram could be seen at a distance of more than five hundred feet.

The evidence upon this point is satisfactory.

ABANDONED MINE.

*Acting Commissioner Baxter to L. E. Morgan, Bullion, Elko Co., Nev., June* 2, 1876.

Where a party abandons a mining-claim he has the undoubted right to remove from said claim any machinery or buildings which he may have placed thereon or any ore that he may have extracted from such mine.

A party relocating an abandoned mine may, in prosecuting work thereon, either sink new shafts and run new tunnels, or continue the work upon such shafts or tunnels as may have been constructed by parties who have abandoned the same.

SALE—ALIEN—DECLARATION.

The portion of a mining claim sold to an alien cannot be patented while such owner is an alien; but on his declaration to become a citizen, his right dates back to his purchase, and he may thereupon secure United States patent for his claim.

*Commissioner J. A. Williamson to Register and Receiver, Carson City, Nevada, July* 18, 1876.

On the 27th of May, 1875, an application for patent for four hundred linear feet of the Lady Allen vein or lode was filed in your office.

This application was sworn to before the register on the 27th May, 1875, by William S. Wood, *one* of the applicants for patent, the others being G. W. Deys, J. P. Sweet, Jacob Smith, Levi Chapman and John B. Gallagher. It appears from a certified copy of the location notice that W. W. Elliot and one other located four hundred feet of the Lady Allen lode—Mary Ann Co.—on the 11th July, 1863, and made record of such location.

The abstract of title is incomplete. In the sworn statement of W. S. Wood, he refers to certain deeds made previous to the year 1870, which, "although properly executed and delivered, were not recorded, and were,

as deponent is informed and believes, destroyed by fire in the town of Silver City, in the year 1870," and alleges that said applicants "have become the owners of, and are in the actual, quiet and undisturbed possession of," said premises. It is shown, however, by the abstract of title from the office of the recorder of Lyon county, Nevada, that J. P. Sweet, one of the applicants, conveyed by quit-claim deed, dated May 19, 1875, fifty feet in said claim to John Henry, and that this deed was recorded May 26, 1875, in the recorder's office.

In an affidavit on file with the case, sworn to by W. S. Wood, on the 1st March, 1876, before the register, Mr. Wood alleges that "he is informed by said John Henry—and the deponent verily believes that said John Henry is an alien, and a subject of Great Britain—that deponent has frequently requested said Henry to make declarations of his intention to become a citizen of the United States, in order that said application for patent might proceed; but the said Henry has constantly, and does now positively, refuse to make any such declaration, but still continues an alien, and declines and refuses to take any step toward becoming a citizen of the United States."

"Deponent further says that by reason of the facts aforesaid, the applicants are unable to present any abstract of title showing a right in them to all of the mining claim aforesaid, and that the undivided fifty feet thereof stands in the name of said John Henry."

It is urged by the attorneys for the applicants for patent, that an alien is incapable of acquiring a patentable interest in a mining location, and that the "attempt of Sweet to convey to Henry what the law prohibits the latter from holding, does not in any way affect the rights of these applicants, the act being void." Said attorneys ask, therefore, that the patent issue to said applicants.

No patent can issue upon this application as it now stands, as they have not title to the entire premises for which patent is sought.

It is true that John Henry, being an alien, has no patentable interest in said mine at the present time, but should he become naturalized, his right to a patent upon compliance with the law would be perfect, for "naturalization has a retroactive effect so as to be deemed a waiver of all liability to forfeiture and a confirmation of his former title." *Vide* Osterman *vs.* Baldwin, 6 Wall. 116; Jackson *vs.* Beach, Johnson's Cases 401.

It has been held by the Supreme Court of the United States, in numerous cases, that an alien can take by deed and hold until office found. *Vide* Fairfax, Devisee *vs.* Hunter, 7 Cranch, 603; Orr *vs.* Hodgson, 4 Wheaton, 453; Craig *vs.* Leslie *et al.*, 3 Wheaton, 563; Craig *vs.* Radford, 3 Wheaton, 594; Cross *vs.* DeValle, 1 Wall., 1; Osterman *vs.* Baldwin, 6 Wall., 116; Governeur's Heirs *vs.* Robertson, 11 Wheaton, 332.

Said application for patent will, therefore, remain suspended until the applicants shall show that they are in a condition to receive patent.

MONTANA LODE CLAIMS.

Lode claims in Montana, located under the Territorial act of December 26, 1864, are entitled to fifty feet in width of surface-ground on each side of the lode in addition to the width of the lode.

*Secretary Chandler to Commissioner Williamson, July* 24, 1876.

I have considered the appeal of Tootle, Hanna *et al.* claimants of Stapleton lode, M. E., No. 120, and Tuscarora lode, No. 118, from your adverse decision of May 5, 1876, upon their application for patents for said lodes.

Each of these lodes has been surveyed in due form, with a width of 120 feet—20 feet representing the width of the lode, and fifty feet on either side for working purposes.

* * * * * * *

Since the decision of my predecessor above referred to, the supreme court of Montana has given construction to the act in question, holding that it authorizes the location and patenting of fifty feet on each side of the lode in addition to the lode itself.

The act being one of the Territorial legislature, the construction given it by the highest court of said Territory should be adopted by this Department. I am therefore compelled to reverse your decision, and hold that the claimant is entitled to 50 feet on each side of the lode, in addition to the width of the lode itself.

As the width of the lode in these cases appears to be 20 feet, I approve the survey, and direct the patents to be issued pursuant to the application therefor.

PROOF OF CITIZENSHIP.

Instructions under the Secretary's decision of July 29, 1876.

*Commissioner Williamson to Register and Receiver, Stockton, California, August* 2, 1876.

Copies of the naturalization certificates are not required when citizenship is properly alleged under the mining act.

You will require applicants to file their affidavits showing whether they are native or naturalized citizens, when and where born. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must also show the date, place and the court before which he declared his intention or from which his certificate of citizenship issued.

PHILADELPHIA *vs.* PRIDE OF THE WEST.

Consideration of a mining location alleged to be void for uncertainty.
The end lines of a mining survey must be parallel. Courses and distances must give way when in conflict with fixed objects.

*Commissioner Williamson to Register and Receiver, Del Norte, Colorado, August* 28, 1876.

On the 10th June last a decision was rendered by this office in case of the application for patent for the Pride of the West lode, Colorado, rejecting the adverse claim of the Philadelphia lode claimants, and overruling their protest against said application for patent.

On the 11th instant the attorneys for the Philadelphia claimants filed in this office an appeal from said decision; and on the 21st instant with-

drew said appeal, and filed a request for a reconsideration of said decision.

It is urged that the Pride of the West was not properly located; that the notices of location are irregular and void for uncertainty; that the surveys of the Pride of the West lode were improperly made and are in effect private and not official, and that the plats do not correctly represent the boundaries of the claim.

In other words, it is claimed by the attorneys for protestants that the location of the claim was not made in conformity with law, and that the survey is irregular.

The *location* of the claim will be first considered. It is shown by certified copies of the notices of location that said lode was located June 10, 1874, and record made of such location on the 19th of the same month, and again located August 7th, 1874, and recorded on the same day.

On the 18th day of September, 1874, an additional certificate of location was recorded. In this notice it is stated that they claim the Pride of the West lode according to the survey made the 16th September, 1874, by T. M. Trippe, U. S. deputy surveyor, as follows, viz: "Running from the discovery tunnel S. 2° 30′ E. (mag. var. 14° 30′) 922 feet, thence S. 6° 30′ W. (mag. var. 14° 30′) 578 feet, being 1,500 feet linear and horizontal measurement along the surface of the lode, with 150 feet in width on each side of the centre line thereof."

The first two location notices recorded do not give the courses along the line of the premises claimed, but the last one does.

The act of the Colorado legislature concerning mines, which was approved February 13, 1874, and which went into force 15th June, 1874, provides in the 13th section thereof that "if at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned * * * such locator or his assigns may file an additional certificate, subject to the provisions of this act." etc.

It appears that the locators of the Pride of the West lode made an additional certificate, based upon an actual survey executed by Deputy Surveyor Trippe, and filed their additional certificate, dated 18th September, 1874, for record in the office of the county clerk and recorder of La Plata county, Colorado, September 18, 1874.

The deputy surveyor, in his sworn statement, alleges that when he made said survey of September 16, 1874, he "placed six posts upon the claim, in full compliance with all the requirements of the law."

It is urged that as the additional location certificate does not state the land or mining district, the county, State, or territory in which the claim is located, and fails to state the date of the location, the same is void and not made in accordance with law.

This location notice was signed by all the locators, was dated September 18, 1874, and recited the fact that it was a *relocation* notice, and that the claim was situated on Green Mountain.

This notice was signed by all of the original locators, was recorded the same day that it was dated, in the the same book of records that the two former locations of the claim were recorded.

In both of the former notices the mining district, county, and territory were stated, also the date of the location of the claim.

This relocation certificate, based upon an actual survey made by U. S. Deputy Mineral Surveyor Trippe, was in my opinion made in conformity with the provisions of the local laws and Congressional enactments.

The objection to the *location* of said claim is accordingly overruled.

*Survey.* The survey made of said claim on the 4th September, 1875, the plat and field-notes of which were approved by the surveyor-general September 24, 1875, and were filed with said application for patent, was executed by the same deputy surveyor who one year previously had surveyed the claim to enable the locators to make record of the premises claimed.

The location notice—the last one recorded—described the premises as "Running from the discovery tunnel S. 20° 30′ E. 922 feet. Thence 6° 30′ W. (mag. var. 14° 30′) 578 feet, being 1,500 feet linear and horizontal measurement along the surface of the lode, with 150 feet in width on each side of the centre line thereof."

The premises described in the plat and field-notes filed with said application extend from the northerly end of the lode S. 20° 30′ E. 922 feet; thence south 3° 42′ W. 578 feet, with surface-ground one hundred and fifty feet in width on each side of the centre line of the survey.

In his sworn statement Deputy Surveyor Trippe alleges that an error was made in the survey made as a basis for the location notice, owing to a defect in the compass used upon that occasion; but that the second survey, the one approved by the surveyor-general, "covered exactly the same ground as the first."

He also states that "the two surveys cover the same identical ground." * * * * "I marked the boundaries of the Pride of the West claim at the first survey by six substantial posts, one at each of the four end corners, and two in the middle of said claim, in manner as described by the Colorado law." * * * "On making the first survey I employed two of the owners of the Pride of the West as chainmen; in the second survey I rechained the distance myself, and found a slight error in the measurement of the first survey. I accordingly moved the stakes at the south end of the Pride of the West lode to their proper position, about 3 feet north of their position as placed by the first survey. * * This changing the stakes, as I mentioned, did not affect the disputed ground of the two lodes."

By the foregoing it is shown that the same premises are described in the field-notes and plat which were filed with the application for patent, as those embraced by the survey made as the basis of the "additional location certificate" and record, and that posts were established at the time of making said first survey, at the four corners and also at the angles in the side lines. It is shown that an error was made in the survey made as the basis of the last recorded notice of location, the posts at the southerly end of the claim having been placed about three feet too far south, and the course between the posts at the angles on the easterly and westerly sides of the claim, and the posts established at the southeasterly and southwesterly corners of the claim given as S. 6° 30′ W., instead of S. 6° 42′ W., the actual course between said points. With these exceptions, the description given in the plat and field-notes

agree with the description contained in the last recorded notice of the location.

It is well settled by judicial decision that courses and distances must give way when in conflict with fixed objects and monuments.

It is also urged that as the discovery of the Philadelphia lode is in reality outside of the boundaries of the Pride of the West claim instead of within such boundaries as represented upon the plat, that such survey is erroneous.

It is not claimed that the courses and distances between the several posts described in the plat and field-notes of the Pride of the West are erroneously given.

The fact that the discovery-shaft of the Philadelphia lodes is represented upon said plat as lying within the exterior boundaries of the Pride of the West survey, while in reality it lies five feet to the east of the easterly boundary of said survey, will not prejudice the right of the Philadelphia claimants in any respect; as the patents in all cases of applications arising under the mining-act follow the description of the premises as given in the field-notes of survey thereof.

It is urged that no patents can issue upon said application as the end lines of the claim as surveyed are not parallel to each other, as required by the last clause of the 5th section of the act of May 10, 1872.

The course along the northerly end line of said survey is N. 69° 80′ E., while the course along the southerly line is N. 86° 18′ W. These end lines are perpendicular to the side lines but are not parallel to each other, there being an angle in the side lines between the northerly and southerly ends thereof. It might be questioned whether there has been a failure to comply with the *spirit* and *intent* of that provision of said section which requires that "the end lines of each claim shall be parallel to *each* other." But as a claimant may at any time abandon the whole or any part of his application for patent, a *strict compliance with the letter of the law* in regard to end lines may be secured by the applicants filing an abandonment of so much of the premises embraced by their application as may be necessary to render the end lines parallel, and having an amended survey filed.

Should such abandonment be filed, the rights of no parties other than the applicants would be affected thereby, as there is no adverse claimant to that portion of the premises embraced in said survey which it would be necessary to abandon to make the end lines parallel.

Seeing no error in the decision of this office of June 10 last, in this case the same will stand as explained herein as the decision of this office.

COMSTOCK LODE.

**Hearing to determine facts in connection with the Sutro Tunnel.**

*Commissioner Williamson to Register and Receiver, Carson City, Nevada, October* 19, 1876.

You notified the applicants for patent for the Brunswick mine and A. Sutro, Esq., that a hearing would be held before you on the 4th instant to receive evidence as to whether or not said mining claim had been drained, benefited, or developed by the Sutro Tunnel.

You state that Mr. Sutro "moved the register to write an official letter

to Mr. Fair, requesting the privilege for Mr. Sutro, or such persons as he should designate, to visit the interior of the mine in question."

This official request you declined.

Your action in this matter is approved. Should Mr. Fair desire to permit Mr. Sutro, or any other person, to visit the interior of his mine, he will undoubtedly accord him that privilege.

This office has never attempted to control or interfere with the right of mine-owners to exercise the right of ownership and possession of mining premises claimed by them, so long as they comply with the requirements of law.

### OMAHA QUARTZ MINE (ON APPEAL.)

**The law is explicit to the effect that notices of mining applications must be published in a newspaper to be designated by the register as published nearest the mining-claim. The register has no discretion except where two or more papers of repute are published equi-distant, or nearly so, from the mining premises sought to be patented.**

*Secretary Chandler to Commissioner Williamson, December* 1, 1876.

The protestants state that the point upon which they rely in the appeal "is as to the sufficiency of the publication" or the failure to comply with the law in the matter of publication of notice.

The notice was published in the Nevada *Transcript*, a paper published in Nevada City, a town situated about six miles from the mine, and the publication was made by direction of the register. It appears that in Grass Valley, a town situated about two miles from the mine, two papers are published, a daily and a weekly. It is contended that the notice should have appeared in a paper published nearest the claim. You held that the publication was sufficient.

The sixth section of the act of May 10, 1872, provides that the register of the land-office "shall publish a notice that such application has been made, for a period of sixty days, in a newspaper to be by him designated as published nearest to said claim."

It would seem that the intention of Congress was plain that the notice should appear in a paper published at a point indicated, and the register is authorized to designate said paper, following the plain instructions of the statute, which would seem to point out his duty. In this case, however, he has exercised his discretion, disregarded the papers published at Grass Valley, and selected another.

I see no warrant for the exercise of this discretion. Under the provisions of the statute the public have a right to look to the paper issued nearest the claim as the one in which a notice of application for a patent should appear. If any discretion is allowed a register, where shall it be limited? If he may ignore a paper published two miles from a claim, and designate one published six miles distant, he may designate one published at a much greater distance. This question would not have arisen had the register performed what, I think, was clearly his duty, and the instructions of your office should be made so explicit as to allow no opportunity for the question to arise in the future. If two or more papers of repute are published equi-distant, or very nearly so, from the claim, the register must designate the one in which the notice shall appear; but in other cases the paper published nearest the claim must be

designated, provided the same is a reputable newspaper of general circulation.

In the case under consideration it does not appear that the applicants are in any manner at fault, and to reject their application, when they have, in good faith, complied with the law and the instructions given them by the local officers, would be a hardship.

I cannot, however, recognize the action taken as a strict compliance with the law, and the case is returned to be submitted to the board of confirmation for its action, as your action rejecting the adverse claim of Foley *et al.*, is approved for the reasons given.

CITY ROCK *vs.* KING OF THE WEST.

An application for patent should show in material particulars compliance with the local and United States laws.

Objection to a somewhat indefinite notice considered. The question to be considered is this: was, or could anybody be, misled by the notice?

Consideration of the question of jurisdiction in cases of contests in disposing of mineral lands. Matters of form are to be decided by the Department of the Interior.

The merits of the case must be decided by the courts.

In mining applications the time or order of presenting the required proof of compliance with law, is of less importance than the proof itself.

*Secretary Chandler to Commissioner Williamson, December* 26, 1876.

On the 15th day of August, 1873, W. H. Pitts *et al.* filed an application with the local officers at Salt Lake City for a patent of a certain mining-claim known as the King of the West lode, situated in Little Cottonwood mining-district, Utah Territory.

During the publication of the order made thereon, R. C. Chambers, claiming to be the purchaser for a valuable consideration of the mining-claim known as the City Rock lode, situated in the same mining-district, filed an adverse claim for a portion of the tract embraced in said application, alleging prior discovery and improvement.

On the 23d of April, 1875, my predecessor reversed your decision of December 14, 1874, and rejected the application of Pitts *et al.*, on the ground that the proof of the posting of the notice and diagram on the claim during the period of publication, as required by law, was defective.

He also rejected the adverse claim of Chambers, on the ground that he was the secret trustee of the City Rock Mining Company, of London, England, a foreign corporation.

On the 29th of the same month a motion was made for a rehearing, and on the 24th of August, 1876, I decided that my predecessor's decision should be so modified as to allow the applicants to make an entry of the tract described in their application, upon their showing compliance with law.

On the 28th ultimo the matter again came before me for a hearing by stipulation of the parties in interest, upon the proofs heretofore filed in the case, subject to any legal objection thereto.

From the application of Pitts *et al.*, and the accompanying papers, it appears that on the 12th day of September, 1870, J. Pitts *et al.* discovered the lode or vein known as the King of the West lode, planted a stake thereon, to which they attached a notice giving the names of

claimants, number of feet claimed, and the general course and direction thereof.

Subsequently they filed in the office of the recorder of said mining-district a notice of their location.

The proof showing that the notice and diagram required by law to be posted on the claim during the publication of the order made upon filing the application has been supplied since my decision of the 24th of August last, from which it appears that said notice and diagram were posted on the claim, and remained so posted during the time of such publication.

Objection was made on the hearing that the application does not show in terms the particular manner in which the applicants had complied with all the rules and regulations of said mining-district.

In those particulars in which it is considered material that an application should show such compliance, viz., the amount of work done each year and the possession and development of the mine, the proof shows that the applicants and their grantors did comply with the rules and regulations of said district and the laws of the United States.

It is also objected that the notice of location is too indefinite.

The application shows that upon making the discovery of the lode the locators planted a stake thereon, to which they attached a notice of their claim, somewhat indefinite, it is true, but when taken in connection with the stake and the monuments mentioned, together with their subsequent improvements, I think it was sufficiently definite, and that no one could have been or was misled thereby.

It was further objected that the proof of posting the notice and diagram upon the claim during the publication of the order made upon filing the application was not filed in proper time.

This question was considered upon the motion for a rehearing in the case, and in my opinion the neglect to file the proof with the application was sufficiently excused by the affidavits then filed.

It must be remembered that all of the proof made in an application for a patent of a mining-claim is *ex parte*, and that proof that the applicants have complied with the law is of more importance than the time or order in which it is made.

I am of the opinion that the applicants are entitled to a patent of the tract described in their application, unless their right thereto shall be defeated in part by the superior right of their adverse claimant.

The adverse claim filed by Mr. Chambers shows that on the 29th day of June, 1870, Swen Johnson *et al.* discovered the vein or lode known as the City Rock lode or claim; that they marked out the extent and boundaries thereof, erected a location monument, and posted thereon a written notice of their location; that on the 11th day of July, 1870, they filed a notice of their claim with the recorder of said mining-district; that said locators immediately commenced to work on said claim, and that the adverse claimant and his grantors have complied with all of the rules and regulations of said mining-district.

The adverse claimant also files a map or diagram of the respective claims, showing their location and the conflict in their boundaries.

Within thirty days after filing said claim, as appears by the certificate of the clerk of the 3d judicial district of said Territory, Mr. Chambers

commenced an action of ejectment against the applicants to recover the possession of that portion of the City Rock claim which is embraced in the application for a patent by the claimants of the King of the West lode.

It further appears by the certificates of the clerk of said court, dated October 16, 1876, that a judgment was subsequently rendered therein in favor of said Chambers and against the applicants. On behalf of said adverse claimant it is urged that upon filing the adverse claim and the commencement of said suit under the seventh section of the act of May 10, 1872, the jurisdiction to determine the rights of the parties to the tract in controversy was transferred to said court, and that this Department has no further duty to perform in the matter until a final determination shall be had of that case.

Section 7 of the act aforesaid reads as follows: "That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure to do so shall be a waiver of his adverse claim.

"After such judgment shall have been rendered the party entitled to the possession of the claim or any portion thereof may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claims, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear from the decision of the court to rightly possess. If it shall appear from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights." * * *

The plain meaning of this section is, that all contests which may arise in the disposal of the mineral lands, shall be tried and determined, if tried at all, in a court of competent jurisdiction; that the adjudication and determination of that court shall be final, and a patent for the tract in controversy shall issue to the successful party or parties, upon showing further compliance therewith. It is equally clear, I think, that when the court has acquired jurisdiction of the subject-matter in controversy,

all other proceedings, except those mentioned, must be stayed until such determination is made, if the suit be prosecuted with reasonable diligence.

The only question which can ever arise is, whether the adverse claimant has complied with its terms, so as to bring his case within it. He must file his claim during the period of publication, showing its "nature, boundaries and extent," and bring suit for a recovery of the possession of it within thirty days thereafter, or be deemed to have waived it.

Has the adverse claimant in this case shown such a compliance? I think he has.

He filed his claim under oath during the period of publication, showing the origin of his title thereto, as well as its nature, boundaries, and extent, and brought suit within the time prescribed to recover possession of that portion of it claimed by the applicants.

To this claim, as filed, the applicants object.

First. That it differs materially from the original location, which was for one thousand feet of the City Rock lode, "extending six hundred feet northerly and four hundred feet southerly," while the claim, as filed, is for a tract of land lying nearly east and west.

Second. That the adverse claimant has no title to the tract claimed, or if he has, he holds it as the secret trustee of the City Rock company, a foreign corporation, and is therefore not entitled to present a claim.

Both of these objections go to the merits of the case, and not to the form of the claim. It is unquestionably your duty, as well as mine, when an adverse claim is presented for consideration, to examine it, and determine whether the claimant has substantially set forth, under oath, its "nature, boundaries and extent;" but if a compliance with the law is shown in these particulars, and a suit has been instituted to determine the rights of the parties, I am of the opinion that we can proceed no further with the investigation. It is the duty of the court in which the suit is pending to determine all other questions relating to the controversy.

I therefore direct that the application of W. H. Pitts *et al.* for a patent of the King of the West lode be suspended until the final adjudication and determination of the rights of the parties involved in the suit now pending in the 3d judicial district of Utah Territory be made, or it is shown that said suit is not prosecuted with reasonable diligence.

### SACRAMENTO *vs.* LAST CHANCE.

An application for patent for a mining-claim, signed by one joint owner for himself and his co-claimants, should be recognized as the application of all the owners in the absence of alleged or apparent fraud, as also the acts of attorneys, performed in the legitimate prosecution and adjudication of cases as the acts of the claimants themselves.

The filing of an abandonment of surface-ground in conflict does not terminate the contest initiated by an adverse claimant, but the judgment of the court having jurisdiction must be had upon all the questions involved in the controversy before patent can issue for the portion of the claim not in dispute.

*Secretary Chandler to Commissioner Williamson, January* 3, 1877.

I have considered the appeal of George R. Ayers and Isaac S. Waterman, claimants of Sacramento lode, from your decision of June 17, 1876,

allowing a patent to issue for the Last Chance, No. 2 mine, Marcus Daly and John Cassin, applicants, situated in Ophir mining district, Utah Territory.

Daly and Cassin applied for a patent March 6, 1875, and during publication of notice, viz., on the 5th of May, 1875, Ayers and Waterman filed an adverse claim, and on the 29th of the same month commenced suit in the district court in the 3d judicial district of Utah.

The first and second objections raised by the adverse claimants in their appeal, viz., that the application for a patent, signed by Daly only for himself and Cassin, the joint owner, was not a legal application, no authority to sign for Cassin being shown; and secondly, that the abandonment of the surface-ground in dispute, filed by Shellabarger and Wilson, attorneys for the applicants, cannot be treated as an abandonment by the applicants, as no authority from them to so act is shown by the attorneys, raise points involving questions of office practice, and are not vital in the consideration of the case.

The practice of your office has been to recognize an application for a patent signed by one joint owner in behalf of himself and the remaining joint owners, in the absence of alleged or apparent fraud. The practice is one of great convenience to the applicants, and is based upon law and reason.

The practice of the Department has also been uniform in regarding the acts of recognized attorneys, performed in the legitimate prosecution and adjudication of cases, as the acts of the claimants themselves. This practice is based upon custom and principle, and I see no reason to change or modify the same in the absence of either alleged or apparent fraud. In my opinion no substantial reasons are assigned why the rules so long and uniformly practiced in your office should be changed, and the application declared illegal, and the abandonment a nullity.

You hold that by reason of the abandonment, "no necessity exists for a further suspension of proceedings upon said application for patent." In view of the provisions of section 7 of the act approved May 10, 1872, I think this conclusion was erroneous. In accordance with the provisions of that section Ayers and Waterman filed an adverse claim upon oath, showing the nature, boundaries, and extent of said claim, and commenced suit. The possession of the surface-ground in dispute may be of the least importance, a mere incident; other and far more important questions may be involved, the location of the lode, for example; and to allow the defendants to obtain the advantage to be derived from the possession of a patent from the Government, simply by filing in your office an abandonment of said surface ground, would, in my opinion, be an evasion of both the intent and letter of the law.

The terms of the act are explicit; all proceedings except the publication of notice and making and filing of the affidavit thereof shall be stayed, until the final adjudication of the case by the authorized tribunal, or a waiver of the adverse claim.

The provision of the law that in case two lodes intersect, the prior location shall be entitled to the ore or mineral contained within the space of intersection, does not, in my opinion, release this Department from the duty of abstaining from all further proceedings in the case, or justify the issuing of a patent embracing the premises in controversy,

with the exception of the immaterial portion abandoned by the applicants, viz., the surface-ground. I think it is clear that it was the intention of Congress to refer *all* questions arising from a conflict of claims, where a suit is duly commenced, to a court of competent jurisdiction, in the possession of the power necessary to ascertain the truth and facts relating to the same, a power not possessed by the Department, and if so, it is the duty of your office to refrain from any act that would in any manner interfere with the adjudication of such controversy.

Reference has been made by the attorneys for the applicants to the decision of my predecessor, dated April 1, 1875, in the matter of the application for a patent for the "Antelope lode." After a careful consideration of the case now before me, I am unable to concur in the views expressed in that decision, or to arrive at a conclusion other than that requiring a suspension of all proceedings before this Department during the pendency of the suit. This decision is in accordance with the views expressed by me on the 26th ultimo, in the matter of the application for a patent for the "King of the West mine."

It follows that your decision must be reversed, and all proceedings in the case suspended, until the final determination of the same by the court, or a waiver of the adverse claim in due form, or by a failure to prosecute the suit with reasonable diligence.

NEWSPAPER PARTLY PRINTED ELSEWHERE.

*Commissioner Williamson to Register and Receiver, Fairplay, Colorado, January* 4, 1877.

In your letter of the 6th ultimo you stated that both of the papers published in your district are printed on one side in the city of St. Louis, Mo., while the other side of each issue is printed in the district.

There certainly can be no objection or impropriety in a newspaper proprietor issuing his paper, if he so desires, with one side of his paper entirely blank or filled with matter printed in another city or State.

In case one side of the paper is printed and the paper is published in a given town in your district, you should, in accordance with the terms of the mining act, publish the notices required by said act in the newspaper "*published* nearest to said claim."

Many of the papers published in those parts of the country which are not thickly settled are printed on one side in another city or State, while the other side is filled with local news or advertisements.

MT. PLEASANT MINE.

A party not in interest, but standing in the relation of *amicus curiæ* has no right of appeal from any decision rendered in a case.

When an applicant withdraws his application for patent before the Department for that portion of the premises against which an adverse claim has been asserted, and confesses judgment in court upon the suit brought by the adverse claimant, patent may issue for the balance of his claim if the proofs submitted are found satisfactory.

*Acting Secretary C. T. Gorham to Commissioner of the General Land Office, February* 17, 1877.

I have considered the application of O. D. Lombard for a patent for the Mount Pleasant mine, Sacramento, California.

Lombard filed application for a patent January 23, 1875. Notice was published from January 28 to April 1, 1875, inclusive.

During the period of publication, viz., March 26, Edward R. Morey filed an adverse claim known as the "Charles mine," and commenced suit in the 11th judicial district, April 21, 1875.

On the 24th of March, Jacob B. Fisher, John Melton, and F. W. Earl filed an adverse claim known as the "Irish mine," and commenced suit in the 11th judicial district, April 21, 1875.

On the 24th of March, Jacob B. Fisher, John Melton, and F. W. Earl filed an adverse claim known as the "Earl mine," and on the 21st day of April, 1875, Fisher and Melton commenced suit in the 11th judicial district, and at the August term of said court a judgment of non-suit was entered in favor of the defendant. This decision was affirmed by the supreme court of California at the following January term—the court holding that "the defendant was the owner of an undivided interest in the mining-claim, and as such was entitled to the exclusive possession thereof against the plaintiffs, they not having shown any title in themselves."

On the 28th of March, 1876, Fisher, Melton, and Earl commenced an action in the court of the 11th judicial district to recover possession of said "Earl mine," and they requested that said application shall be suspended until said suit shall have been determined, unless the application for patent shall be rejected.

In your decision of September 2, 1876, you hold that this suit, having been commenced after the expiration of the 30 days prescribed in the seventh section of the act of May 10, 1872, cannot operate as a bar to the issuance of a patent.

This decision is in accordance with that of my predecessor in the case of H. B. Morse *vs.* Eli S. Streeter, (Copp's U. S. Mining Decisions, p. 127.)

You also state that the application will remain suspended until it shall have been clearly established that the applicant has the possession, and the right of possession, to the premises, by virtue of compliance with the local laws or customs, and the Congressional enactments.

On the 28th of December, 1876, A. St. C. Denver, Esq., attorney, in behalf of the protestants, filed an argument adverse to the claim of Lombard.

December 4, 1876, the local officers transmitted additional evidence in the matter of the application of Lombard. In your decision of the 9th ultimo, you overruled the objections to the issuance of a patent, and announced that the case would be taken up at once for patenting. On the 10th ultimo, Mr. Denver, in behalf of the owners of the "Earl mine," the contestants and protestants, appealed from said decision. On the 13th ultimo, you informed Mr. Denver that an appeal by a protestant did not lie from the decision of your office, and on the same day Mr. Denver appealed from said decision, claiming first, that under the provisions of the 6th section of the act of May 10, 1872, an appeal may be taken by the protestants; secondly, that Fisher *et al.* did file an adverse claim and commenced suit within the time required; thirdly, that a suit is now pending before the district court, in which the property is situated, and that while said suit is pending they have the right

to appear as contestants, as well as protestants, having the right to appeal from your decision, in order that their legal rights may be reviewed by the appellate authority.

I think your decision, that the suit now pending in relation to the "Earl mine" was not commenced within the time required, must be sustained, hence the parties can appear in the attitude of protestants only.

In my decision of March 24, 1876, in the matter of the application for a patent for the Boston Quicksilver mine, on appeal from your decision denying the right of Mr. McGarrahan to appeal to this Department, it was stated that "while it was laudable in Mr. McGarrahan to make suggestions to your office of what he believed was an attempted fraud upon the government in the matter of this application for patent, and proper for you to accept and consider such suggestions in an examination of the case, I can hardly conceive that it will be seriously contended that he, not being a party in interest, but standing in the relation of *amicus curiæ*, has a status entitling him to an appeal. I am very clearly of the opinion that he has no such right, and therefore affirm your decision to that effect."

Applying that rule to this case, Foster *et al.* not being parties in interest, in the eye of the law, by reason of their failure to commence suit in time, and appearing as protestants only, have no right of appeal.

It appears, as before stated, that E. R. Morey, claiming the "Charles" mine, presented an adverse claim, and commenced suit, upon complaint duly filed, within the prescribed time.

This suit was pending at the date of your decision, and in my opinion should have operated as a stay of all proceedings before this Department, as indicated in my letters of December 26, 1876, in the case of the King of the West *vs.* City Rock, and of the 3d ultimo, in the case of the Last Chance, No. 2.

Since the date of your decision, however, viz., on the 16th of February, there was filed with me a certified copy of the complaint of E. R. Morey in the suit commenced April 21, 1875, in the 11th judicial district of California; also a duly-certified copy of the confession of judgment.

[No. 2,785.]

In the district court, 11th judicial district, county of El Dorado, State of California.

E. R. MOREY, plaintiff,
*vs.*
O. D. LOMBARD, defendant.

Now comes the defendant, by his attorneys, G. J. Carpenter and Geo. Cadwalader, and waiving all his other pleas in the above cause, hereby disclaims any right, title, or interest in and to the premises described in the complaint of plaintiff herein, and consents that plaintiff have judgment according to the prayer of his complaint herein.

G. J. CARPENTER,
GEO. CADWALADER,
*Att'ys for Defendant.*

I hereby acknowledge the service of the above answer, and consent to the filing thereof.

A. P. CATLIN,
GEO. G. BLANCHARD,
*Att'ys for Plaintiffs.*

Indorsed: Filed Feb. 6, 1877.

GEO. BURNHAM, *Clerk.*

Papers filed on the 16th instant also show that the same action was taken in the case of J. B. Fisher *et al.*, claiming the "Irish" mine, who commenced suit April 21, 1875, as appears from the following:

[No. 2,786.]

In the district court of the 11th judicial district, county of El Dorado, State of California.

J. B. FISHER and JOHN NELTON, plaintiffs,
*vs.*
ORVILL D. LOMBARD, defendant.

Now comes the defendant by his attorneys, G. J. Carpenter and Geo. Cadwalader, and waiving all his other pleas in the above cause, consents that plaintiffs have and recover judgment against him acording to the prayer of their complaint herein.

G. J. CARPENTER,
GEO. CADWALADER,
*Att'ys for Defendant.*

I hereby acknowledge service of the above answer, and consent to the filing thereof.

A. P. CATLIN
and GEO. G. BLANCHARD,
*Att'ys for Plaintiffs.*

Indorsed: Filed February 6th, 1877.

GEO. BURNHAM, *Clerk.*

It thus appears that Lombard has waived his claim to the premises in dispute, and debarred himself from asserting his right to the same in the future.

The 7th section of the act of May 10, 1872, requires that when suit has been commenced, all proceedings shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

By the action of Lombard, the defendant, taken before the proper tribunal, viz., the court having jurisdiction in the case, the plaintiffs, Morey, Fisher *et al.*, have obtained all they sought to obtain by the commencement of the suits, and the same are virtually ended, and the controversy settled. No reason therefore exists why a patent should not issue for the tract not in controversy.

The abandonment of the surface-ground, or of the entire premises in controversy, before this Department, and the continued prosecution of the suit involving the same premises, before a court of competent jurisdiction, is not, in my opinion, a proceeding justified by a correct interpretation of the mining law; but when the applicant for a patent before

this Department, who becomes the defendant in a suit commenced by an adverse claimant, in a court of competent jurisdiction, waives his claim, confesses judgment, and thus acknowledges the superior right of the plaintiff to the tract in dispute, he has done all that can be required of him in thus ending the controversy, and should be no longer deprived of a patent for the premises to which he has shown himself legally entitled.

Your decision, holding that Lombard is entitled to a patent, is affirmed for that portion of the premises not covered by the claim known as the "Charles" and the "Irish" mines.

It will be necessary for the applicant to cause the surveyor-general to forward amended plat and field-notes describing only that portion of the claim which he has not abandoned.

CORNING TUNNEL *vs.* SLIDE LODE.

Under section 2335, an officer authorized to administer oaths *within* the land-district may administer the same *without* the district, but within his jurisdiction, where that jurisdiction extends within the land-district where the claims are situated.

*Acting Secretary Gorham to Commissoner of General Land Office, Feb.* 17, 1877.

I have considered the case of the Corning Tunnel, Mining, and Reduction Company *vs.* Wm. G. Pell, Samuel Cochran, and John W. Nicholson, applicants for patent for 1,500 linear feet of the Slide lode, Gold Hill mining district, Boulder Co., Central City, Colorado land-district, on appeal from your decision of November 3, 1876, adverse to the Corning company. The facts of this case are as follows, to wit: On November 24, 1875, W. G. Pell, Samuel Cochran, and John W. Nicholson filed an application in the local land-office for a patent for 1,500 linear feet of the Slide lode, Gold Hill mining-district. Sixty days' notice by publication in the *Weekly Sunshine Courier*, from December 4, 1875, to and including February 12, 1876, was also made, and the plat and notice were properly posted on the claim, and in the register's office.

A duly certified abstract of title from the records of Boulder county, shows that said lode was discovered July 26, located July 30, and recorded July 31, 1875. Applicants also show a compliance with the law, and have record title of said location. The Corning Tunnel, Mining, and Reduction Company, by F. A. Squires, president, filed an adverse claim against said application, January 20, 1876, and commenced suit by ejectment to determine the right of possession of the tract in question, in the district court of Boulder county, on February 7, 1876.

Mr. Squires alleges that the Slide lode is within the location of the tunnel site of the company which he represents; that said Slide lode was discovered after the tunnel site, and is a blind lode; that said tunnel site was located in conformity with the mining act of May 10, 1872; that said company have expended a large amount of money; and that their rights are prior and superior to those of the applicants. A copy of the location notice shows that George C. Corning, A. J. Mackey, James A. Carr, and Daniel A. Robinson located and recorded said tunnel site September 18, 1872. They made a second location of the same July 9, 1873, wherein the tunnel is described as seven feet high, six feet wide, and one hundred and thirty feet in length.

Said company have record-title to said tunnel site and location. One of your reasons for rejecting the adverse claim is that said claim was not sworn to within the land-district where the mining-claims are located. The facts relative to this matter are that the adverse claim was sworn to before A. J. Mackey, deputy clerk of the district court in and for Boulder county; and although there is no testimony showing the exact *part* of the county where the oath was administered, it is shown that the office and residence of said clerk were in the town of Boulder, in said county, and it is probable that the affidavit was made at that place. Now, the line between the Central City land-district and the Denver land-district runs through Boulder county, leaving the *locus* of the town of Boulder in the Denver district, and the mining-claims in the Central City district. Section 2335 of the Revised Statutes of the United States provides that "all affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated." I am of the opinion that under this statute an officer authorized to administer oaths *within* the land-district may administer the same *without* the district, but within the jurisdiction. I do not think the cases referred to in your decision are in point, for the reason that there is a manifest difference between the acts of the commissioner who has authority only to administer oaths *in* California for Nevada, (as in the Dardanelles Mining Company *vs.* The California Mining Company case, Copp's Mining Decisions, 161,) and the acts of an officer *in* the State, exercised *within* his *jurisdiction*, where that jurisdiction extends *within* the land-district where the claims are located.

Where suit is brought by the adverse claimant, under the 7th section of the act of May 10, 1872, within the time required by law, it is only necessary to pass upon the regularity of the adverse claim, leaving the rights of the parties to be determined by the court.

JUNIPER MINE. (B.)

Where an adverse claim is endorsed, as in this case, "withdrawn and filed" on a later day, the later is regarded as the date of filing the adverse claim.

Evidence of proper publication of notice is sufficient, if the editor and proprietor alleges under oath that the notice was published for sixty days, giving the date of the first and last insertions of such notice, the last insertion being more than sixty days after the first insertion.

As four plats of a mining-claim and field-notes in duplicate are prepared by the surveyor-general, it cannot be objected that any plat or field-notes are copies and not originals.

The surveyor-general is not required to make a separate certificate as to the $500 improvements on a claim. Such a certificate is endorsed on both the plat and the field-notes of survey of the mining premises in question.

In the absence of any proof or allegation to the contrary, it is to be presumed that the locator of a mine complied with all the requirements of the law before record of his location was made.

*Commissioner Williamson to Register and Receiver, Elko, Nevada, March* 10, 1877.

On the 6th of September, 1876, John F. Lewis filed in your office an application for patent for fifteen hundred linear feet of the Juniper mine, Sprucemont mining-district, Elko county, Nevada.

The notice and diagram were posted upon the claim from the 28th of August, 1876, to the 12th of November, 1876, and in the register's office from the 6th of September, 1876, to the 22d of January, 1877.

By the sworn statement of the editor and proprietor of the *Elko Weekly Post*, it is shown that the notice was published in said newspaper for the period of sixty days, the first publication being on the 9th of September, 1876, and the last on the 11th of November, 1876.

On the 6th of November, 1876, the applicant for patent filed in your office a relinquishment to the westerly three hundred and nineteen feet of the claim as applied for, and withdrew his application for patent to the portion relinquished.

Against this application for patent, a protest and adverse claim was filed by the Sprucemont Mining Company, which bears the following endorsement, viz:

"Filed in Elko land-office this 8th day of November, A. D. 1876.

"W. M. STAFFORD, *Receiver*."

"Withdrawn and refiled in the Elko land-office this 9th day of November, A. D. 1876. W. M. STAFFORD, *Receiver*."

This filing cannot be considered as having been made until the 9th day of November, 1876. It is evident that the protestant did not regard this protest as *filed* until the 9th of November; for after leaving the papers with the receiver on the eighth of the month, the same were withdrawn and placed on file the following day in the local office, where they remained until transmitted to this office by the local officers. It is alleged by the applicant for patent and his attorney, in their sworn statements, that one or more of the papers filed by the protestant were not signed when left with the receiver on the 8th of November.

It is, however, unnecessary to inquire whether they were signed on the 8th of November or not, as the protest was not *filed* until the 9th day of the same month.

Said filing having been made after the expiration of the sixty days' notice by publication, cannot be considered as an adverse claim.

Section 2325 of the Revised Statutes of the United States provides that if no adverse claim has been filed against an application for patent at the expiration of the sixty days' notice by publication, it shall be assumed that the applicant is entitled to a patent, and that no adverse claim exists, and "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

This filing can be considered as a protest only, and said protestants are to be considered as parties to the contest for the purpose of *showing from the record* that the claimant has not complied with the requirements of the act, *vide* decision of the Hon. Secretary of the Interior, dated April 30, 1874, in case of John H. McMurdy *et al. vs.* E. S. Streeter *et al.* [See page 133 herein.]

It is urged by the attorney for the protestant that the proof of publication of notice is insufficient.

By the sworn statement of the editor and proprietor of the *Elko Weekly Post*, it is shown that the notice was "published in said newspaper for sixty (60) days, the first publication being on the ninth day of September, 1876, and the last publication on the eleventh day of November, 1876."

Section 2325 Revised Statutes requires the register to publish the notice "for the period of sixty days."

The editor and proprietor of said newspaper alleges under oath that the notice was published for the period of *sixty days*, and that this fact may be definitely established, he gives in his sworn statement the date of the first and last insertions of such notice, the last insertion being more than sixty days after the first insertion.

The proof of publication of notice in this case is sufficient, and the objection urged is overruled.

It is also urged that the plat and field-notes are copies, and not the originals.

Section 2325 Revised Statutes provides that an applicant for patent may file in the proper land-office an application for patent, "together with a plat and field-notes of the claim * * * made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim."

In all cases of applications for patents for mining-claims the surveyor-general prepares four plats of the survey of the claim, and also prepares the field-notes of such survey in duplicate.

The duplicate field-notes and the four plats, when found correct, are approved by the surveyor-general.

In the case under consideration one of the plats and a transcript of the field-notes of the survey of the claim certified to as correct and duly signed by the surveyor-general of Nevada, in the usual form, and in accordance with the instructions from this office, were filed with the local officers on the same day that said application for patent was filed.

This objection is accordingly overruled. It is urged that the claimant failed to comply with the law by neglecting to file a certificate of the surveyor-general that five hundred dollars had been expended upon the claim with the register, within the sixty days of publication.

The approvedplat of the premises for which patent is sought, is referred to as "Survey No. 41, plat of the John F. Lewis claim on the Juniper lode, Sprucemont mining-district, Elko county, Nevada." The field-notes are equally explicit in referring to the said premises.

As before stated, both the plat and the field-notes were filed with the application for patent, and upon each is a certificate of the surveyor-general of Nevada, "that the value of the labor and improvements upon said mining-claim is not less than five hundred dollars."

This objection is overruled.

It is urged that no patent can be issued upon said application, as "there is no proof that at the time the Juniper claim was located, any ledge had been discovered within the limits of the location claimed."

In the original location notice reference is made to the fact that the locator claimed by virtue of such location "one claim of fifteen hundred (1,500) feet on this ledge, lode, or deposit of mineral-bearing rock," etc.

This claim was recorded in the district recorder's office, and it is to be presumed, in the absence of any proof or allegation to the contrary, that the locator had complied with the law in the matter of his location before the recorder made record thereof. In the sworn statement of the applicant he alleges that he and his grantors "have observed and conformed to the rules, laws, and regulations governing this district."

This objection is overruled.

Several other objections have been urged, but after a careful consideration of the same and examination of the papers in the case, no objection is found which can defeat the application for patent.

You will upon the receipt hereof, allow J. F. Lewis to make entry of the premises applied for, with the exception of that portion abandoned on the 6th of November, 1876.

ADVERSE CLAIMANT'S REMEDY IN COURT OF EQUITY.

*Commissioner Williamson to Register and Receiver, Sacramento, California, March* 22, 1877.

In the case under consideration (Seymour *vs.* Wood) no adverse claim was asserted by C. H. Seymour within the period of publication, and no suit was commenced by him against said applicants, bringing into question the right of possession to any portion of the premises for which patent is sought until thirteen months had elapsed from the date of the first publication of notice.

The fact that Seymour commenced proceedings against the applicants for patent at that late day, and secured judgment against them for a portion of the premises, cannot be taken cognizance of by this office.

The law clearly points out the time within which an adverse claim must be filed and the time within which suit must be commenced thereon, and this office has not the power, if it had the disposition, to disregard these plain and positive requirements.

Where parties fail to file their adverse claims within the time and in the manner provided by law, they cannot subsequently be permitted to assert an adverse claim before this office.

If Mr. Seymour has a right to any portion of said premises which this office cannot take cognizance of by reason of his having failed to assert the same as provided by the statute, his remedy will be in a court of equity, to have the patentees declared trustees and compelled to convey the legal title. (Stark *vs.* Starrs, 6 Wall., 402; Johnson *vs.* Towsley, 13 Wall., 72.)

This case will be taken up for final action, as though no objections had been presented by Mr. Seymour.

BLACK HILLS MINES.

*Commissioner Williamson to Hon. John P. Jones, U. S. Senate, April* 3, 1877.

Parties should *re-record* their mining-claims and locations in the Black Hills, Dakota, to fully insure them in regard to the title thereto, where such locations were made prior to the ratification of the treaty, to wit, February 28, 1877.

SCHOOL SECTIONS.

The title to school sections vests in the State upon survey thereof if their mineral character is unknown at that date.

*Secretary Schurz to Commissioner Williamson, April* 4, 1877.

I have considered the case of the State of California *vs.* L. J. Poley and Henry Thomas, involving the right to the N.E. ¼ of S.E. ¼ of section 36, township 3 south, range 13 east, M. D. M., Stockton, California, on appeal from your decision of June 26, 1875.

The State claims under the school grant. Poley and Thomas apply for a patent under the mining-act. The township was surveyed in December, 1854, and the patent was filed in the local land-office March 14, 1855. The placer mining-claims appear to have been located in the year 1858.

It will thus be seen that the question presented is, whether the State of California has a legal title to the land in sections 16 and 36, where it is ascertained, after the survey and identification of said sections, that the land therein is mineral.

By the 6th section of the act of March 3, 1853, the sections above designated were granted to the State of California for school purposes, and when the lands were surveyed the title of the State attached to the same, and, if there was no legal impediment, became a legal title. (18 Howard, 173.)

After a very elaborate discussion, my predecessor, Mr. Secretary Delano, held that Congress, by the act of 1853, did not intend to grant, and did not grant, to the State any mineral lands which by survey are shown to be in sections 16 and 36.* (Copp's Mining Decisions, p. 109.) Accepting this conclusion as the correct one, the question still remains, Did the title to lands in said sections vest in the State, upon survey, if their mineral character was unknown at that time, and the same were regarded by the officers of the Government as ordinary public lands, not reserved, or otherwise appropriated, but subject to disposal under the general laws of the United States?

It must be held that it did so vest, unless there was an express prohibition existing by virtue of some law.

It would seem that it was the intention of the framers of the act not to grant any of the mineral lands to the State. Mr. Hall said in the House of Representatives, on the day of its passage, "There are some donations made to the State of California, but they are precisely the same as those made to the other States of the Union; but in the clauses making the donations it is provided that the mineral lands and the lands reserved for other public uses shall be excepted. Mineral lands are reserved in all cases." (*Cong. Globe*, vol. 26, p. 1038.)

In support of this theory, the 12th section of the act may be cited. By its provisions, 72 sections of land were granted to the State for the use of a seminary of learning, and mineral lands were excepted; but it will be observed that the lands were to be selected by legal subdivisions; and by an express provision in section 3 of the act, none but township lines were to be surveyed when the lands were mineral; hence the prohibition was well defined and easily followed. The same remarks will apply to the grant made by section 13 of the act, for the purpose of erecting the public buildings of the State.

By the 6th section of the act under consideration, all the public lands in the State of California were declared subject to the pre-emption laws, except "sections 16 and 36, which shall be, and hereby are, granted to the State for the purpose of public schools in each township." * * * There appear to be no words of limitation or restriction in the clause making the grant. The words are absolute and unqualified; the sec-

* See page 101.

tions are excepted from the operation of the pre-emption law, together with lands otherwise appropriated or reserved by competent authority, or claimed under a foreign grant, and mineral lands; but I know of no rule of construction of language that would justify an interpretation of the words used in the granting clause, that would in effect be a limitation of said grant. This view does not, I think, conflict with that expressed by Secretary Delano; for by section 3 above cited, lands known to be mineral could not legally be surveyed or designated as school lands. In compliance with the doctrine established by the courts, it must, I think, be held that the title vested in the State at the date of survey, when the land was not known to be mineral, or was not treated as such by the government.

If, following the doctrine of the courts, the grant of school lands takes effect at the date of survey, can the character of the land, subsequently determined, change or affect said title? If it can, for how long a period can such change be effected? If for three years, why not for ten or fifty, or after the title derived from the State has been transmitted through numerous grantees? For lands confessedly non-mineral at the date of survey, may, many years thereafter, be ascertained, through the improvements in mining operations, to be valuable as mineral lands. To maintain such a doctrine might result in placing in jeopardy the title held by grantees to all the school lands in California, and could only be authorized by the most positive and clearly-expressed provisions of law. In my opinion there is nothing in the act which can thus be interpreted. I must, therefore, hold that the discovery of the mineral character of the land in sections 16 and 36, subsequent to survey, does not defeat the title of the State to the same as school land. The case of Sherman *vs.* Buick, (45 Cal., 656,) is cited by counsel. In this case the court held that "the title to each sixteenth and thirty-sixth section, upon its being surveyed, vests absolutely in the State." This decision was reversed by the United States Supreme Court at the present term.

After a careful examination of the case, however, I do not think that the question of the title of the State to mineral lands is involved, or that the decision in any way affects that question.

It is not intended to assert that the title to the lands in said sections passes to the State upon the survey under the provisions of the acts of July 26, 1866, and July 9, 1870, said lands at the date of survey being recognized and regarded as mineral.

The views expressed by Secretary Delano, before referred to, will continue to control the Department in the disposal of lands thus designated.

There are other questions presented in the case under consideration; but if the views above expressed are correct, their consideration is not called for.

### PRIDE OF THE WEST MINE.

**A protestant in a mining application for patent has no right of appeal from the decision of the Commissioner of the General Land Office.**

**It is the duty of the adverse claimant to commence suit in proper form, within the required time, and if he trusts the uncertain medium of the United States mail he must abide the consequences, should delay ensue through misfortune or accident. Should the failure to commence suit be the result of the unadvised or the corrupt and dishonest action of his attorney, the Interior Department cannot redress the wrong.**

**A corrupt or dishonest attorney, on a proper showing, will be debarred from practice before the several Executive Departments of the Government.**

*Secretary Schurz to Commissioner of General Land Office, April* 17, 1877.

I have considered the question presented by your letter of February 12th last, in the matter of the application of C. E. Schoellkopf *et al.*, for a patent for the Pride of the West mine, Animas mining-district, Colorado, Oscar Roedel *et al.*, adverse claimants. (See page 194.)

The question for determination is, can the adverse claimants be considered, by this Department, as parties in interest, and therefore entitled to an appeal? If so, it results from the fact that they have filed notice of an adverse claim, and commenced suit within the period of time required by the statute.

The adverse claim was filed December 8, 1875. From the certificate of George A. Bute, clerk of the district court for the 3d judicial district of Colorado, it appears that C. Husted and Wilson and Taylor, attorneys for O. Roedel *et al.*, plaintiffs, commenced suit January 31, 1876, against C. E. Schoellkopf *et al.*, defendants, involving the possession of the premises, or a portion of the premises, in controversy.

It will thus be seen from the record that the suit was not commenced within the period required by law, viz., within thirty days after the filing of the adverse claim.

There is on file an affidavit of Charles Husted, dated January 8, 1876, stating that on the 29th day of December, 1875, as attorney for Oscar Roedel *et al.*, he mailed, postage-paid, and addressed to the clerk of the district court, a declaration and præcipe in ejectment, that Schoellkopf *et al.* were defendants, and that the premises involved were those now in dispute.

On the 10th of August, 1876, Oscar Roedel, one of the adverse claimants and one of the plaintiffs, filed an affidavit asserting that Charles Husted, his attorney employed for the purpose of filing the adverse claim and commencing suit, corruptly conspired with Schoellkopf, the applicant, to delay the commencement of the suit beyond the period of thirty days after filing the adverse claim. The allegations of Roedel are denied by the affidavit of Schoellkopf.

I shall not attempt to reconcile these conflicting statements. It is apparent that the suit was not actually commenced within the period required, for by the laws of Colorado it is provided that "the action of ejectment shall hereafter be commenced by the filing of a declaration in the office of the district court of the proper county, whereupon a summons shall issue directed to the sheriff for service as in other cases." The mailing of a declaration addressed to the clerk of the court cannot be considered the filing of the same in the office of the district court and the commencement of a suit.

The provisions of the statute requiring the suit to be commenced within a certain time are mandatory. The time in which such action is to be taken is limited, and it is not within the province of this Department to extend the time fixed; no discretion or power to thus act is vested by this statute in the Department. Congress, no doubt for wise purposes, thus restricted the authority of the executive officers of the government, and opened wide the doors of the courts to the adverse claimant.

It is his duty to commence his action in the proper form, and if he elects in so important a matter as the filing of his declaration, to trust to the uncertain medium of the United States mail, he must abide the consequences of delay, should delay ensue through misfortune or accident; or should the failure to commence suit in time be the result of the unadvised or the corrupt or dishonest action of his attorney, it is a matter that the Department is powerless to redress, he must seek for relief in the proper tribunal—the courts are open, and in them he may assert his rights. (See case of Morse *vs.* Streeter, Copp's U. S. Mining Decisions, p. 127, and the case of O. D. Lombard, *Copp's Land-Owner* for March, 1877.)

Should a charge against an attorney, so grave as the one presented in this case, be clearly established, the Department, to protect its own honor and the interests of citizens, would debar the offender from practice before the executive offices of the government, but it cannot restore the right of a client thus corruptly sacrificed.

In this case Roedel *et al.* can be considered only in the light of protestants, hence an appeal from your decision on the merits of the application cannot be entertained. (See cases above cited.)

BRIGHT POINT *vs.* VENUS.

Where a party fails to deposit the required amount for office work after the field-work in making a survey, as the basis of an application for patent, has been performed, the surveyor-general may designate a subsequent survey by the same number. Thereafter, on deposit being made, the other survey may be completed and approved, but conflicts with all prior surveys must be shown thereon, including the one above described, surveyed in the field at a later date.

*Commissioner Williamson to Surveyor-General Kimball, Salt Lake City, Utah, April* 10, 1877.

On the 18th of September, 1876, F. Dickert, deputy mineral surveyor, obtained from your office a number by which to designate a survey which he expected to make of the Bright Point mine. The number given him was sixty-one.

On the 22d of September, said deputy filed in your office the field-notes of survey of said claim, but made no deposit for office work.

As the deposit for office work was not made, and as no further attention was paid to said survey by said deputy, or the claimants of said mine, you were wholly justified on the eighteenth of November, 1876, in directing that the number sixty-one should be used to designate a survey which, on that day, you gave the order to Deputy-Surveyor E. B. Wilder, to make of the Venus mine in the same district, and for which survey C. F. Winslow made required deposit.

Deputy-Surveyor Wilder made a return of the field-notes of surveys of the Thor and Venus mines, and the same after the necessary corrections had been made, were approved by you on the twenty-second of December, 1876. In the meantime, however, L. P. Borg, one of the claimants of the Bright Point mine, made the required deposit; but as a survey had been made for the Venus mine, which embraced a large portion of the premises described in the Bright Point mine, you properly required that the survey of the Bright Point mine should show the conflict with the Venus survey.

Parties who desire to have official surveys made of their mining claims must make the required deposit for office work with the surveyor-general, and until such deposit is made the surveyor-general should not treat such surveys as official.

Your action in requiring the Venus and Thor claimants to make references in their surveys to the Bright Point mine is approved, the same being in accordance with your previous instructions in such cases.

SECOND SURVEY FOR SAME PREMISES.

A survey under the mining act does not withdraw the land embraced thereby from sale or subsequent survey unless followed by an application for patent.
Instructions in cases where a party desires survey made of a tract already surveyed.

*Commissioner Williamson to Surveyor-General Campbell, Denver, Colorado, April* 20, 1877.

This office has been informed that cases frequently arise where parties secure a survey under the mining laws of lode, mill-site, or placer-claims, and fail to file an application for patent therefor, and the question is presented whether a second survey may be approved for the same premises. An application for patent withdraws the lands therein described from a subsequent application until the first application is withdrawn or rejected. But a survey, unless followed by an application, does not withdraw the premises therein described from survey or entry by any qualified party who shows compliance with the terms of the act. To hold that a survey under the mining act withdraws the land embraced thereby from sale, or subsequent survey, would be to place it in the power of any party who might secure a survey to a given claim, to prevent the government from disposing of its title to that portion of the public domain. Where a party desires a survey made of a tract already surveyed, you will require him to file with you a certificate from the register of the local land-office where such claim is situated, that there is no application for patent pending under such prior survey. The field-notes of the subsequent survey should show that they embrace the same premises as those described by such prior survey, giving the number and the name of the claimants under such prior survey. If conflicts exist they should be shown in accordance with instructions of November 5th, 1874.

[If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plats and field-notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other.]

DELINQUENT CO-OWNERS.

Proof required in applications for patents where proceedings were had against co-owners of a mine who failed to pay their share of the required expenditure.

*Commissioner Williamson to D. P. Whedon, Silver Reef, Utah, June* 9, 1877.

Where a party proceeds against one or more of his co-owners under section 2324 of the Revised Statutes of the United States, he should file with his application for patent a copy of the original notice of location; an abstract of all conveyances made of the claim; a copy of the notice published to delinquent co-owners—which notice should embrace the

names of all delinquents—to which must be attached the affidavit of the publishers of the paper in which the notice was inserted that the attached notice was published for the period of ninety consecutive days, giving dates; the affidavit of the claimant or claimants who have made the required expenditures—corroborated by the sworn statement of two or more disinterested witnesses—showing the character and extent of the improvements made upon the claim, and the time when such improvements were made.

There must also be filed the sworn statement of the claimant or claimants who had made the required expenditures as to whether or not either of the parties whose names appear in such published notice contributed his proportion of the required expenditure either during the ninety days' notice by publication or the succeeding ninety days.

The evidence must be full, positive, and explicit, upon all these points.

UNION COMPANY'S MINE.

An adverse claim to be considered must be sworn to by the party claiming adversely and not by an attorney. Hearings may be had to determine whether the legal expenditure has been made on a mine for which patent is desired.

An expenditure of more than fifteen hundred dollars by the owners of an adjoining mine on the portion of a tunnel running through the premises embraced in an application for patent, in case the applicants were to have an interest in such tunnel, is considered an expenditure under the mining law upon the claim applied for.

*Commissioner Williamson to Register and Receiver, Shasta, California, June* 11, 1877.

On the 1st of March, 1876, George K. Willard, Prince T. Baker, C. W. Kingsbury, and John H. Shuffleton filed in your office an application for patent for twelve hundred linear feet of the Union Company's mine.

On the 28th of March, 1876, J. B. Batcheller filed in your office a protest and adverse claim against said application for patent. In his sworn statement he alleges that to the best of his knowledge and belief the required amount has not been expended upon said claim, and that N. S. Batcheller is the owner of a portion of said claim.

On the 5th of April, 1876, J. B. Batcheller filed in your office a withdrawal of said protest and adverse claim, in which he states that he makes said withdrawal "without prejudice to my rights as contestant in the above case, on grounds other than those specified in said affidavit."

This filing could not have been considered as an adverse claim, as it was not sworn to by a person claiming adversely. In said sworn statement he does not allege ownership, but alleges that N. S. Batcheller owns an interest in said claim.

Section 2326, Revised Statutes of the United States, declares that "where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same."

The Hon. Secretary of the Interior, on the 24th of November, 1873, in the case of the Jenny Lind Mg. Co. *et al. vs.* The Eureka Mg. Co., decided "that the *jurat* to the adverse claim * * * must be made by the party and cannot be made by an attorney."

On the 29th of April, 1876, J. B. Batcheller filed in your office a protest against said application, alleging in his sworn statement that the required amount—five hundred dollars—has not been expended upon said claim, and requesting that a hearing be held in regard to this matter.

You fixed the 1st of September, 1876, as the day for the hearing.

The testimony submitted shows that on the 2d of May, 1876, the claim under consideration—the Union company's claim on the 1st extension north of Chicago mine—was located.

There has been filed in this case a copy of the record of location of this claim from the office of the recorder of South Fork mining district, which sets forth that said claim was located by the following-named parties, viz., J. H. Shuffleton, William Payne, P. T. Baker, and C. W. Kingsbury, each taking three hundred feet, and Geo. E. Vance and William Laury, each taking one hundred and fifty feet, aggregating fifteen hundred feet. No abstract of title has been filed, or copy of any conveyance from either of said locators.

In the sworn statement of two of the original locators, to wit, C. N. Kingsbury and P. T. Baker, they allege that the original notice of location was made out in the names of the first four parties named in the record, and that twelve hundred feet only were embraced in such location, and the last two names were added to such notice before record, without their knowledge or consent.

J. B. Batcheller alleges in his sworn statement that Baker, one of the said locators, came to his office and requested him to draw up the notice of location in the name of Kingsbury, Baker, Payne, and Shuffleton, and consented that the names of Vance and Laury should be added thereto at the request of the affiant.

This is denied by Baker in his sworn statement.

It appears from the sworn statement of Batcheller that while acting as recorder of said district in 1866, and since that date, he has entertained the peculiar idea that the notices of locations of mining-claims filed with him as recorder are his own private property.

All of the witnesses testify that this claim was located by Shuffleton, Payne, Baker, and Kingsbury, but Batcheller alleges that the names of Laury and Vance were added to the notice at his request.

From the evidence submitted it is not clearly shown that the locators consented to the addition of these two names to their location notice; but, on the contrary, as said applicants apply for twelve hundred feet only, the number of feet actually located by them, and as neither Vance nor Laury, nor any one claiming under them, has asserted an adverse claim, it would appear either that those two names were not rightfully upon said notice, or if rightfully the notice, that they claimed three hundred feet of said mine lying northerly of the twelve hundred feet applied for.

It is therefore held that upon the applicants furnishing satisfactory evidence as to what disposition Wm. Payne made of the interest located by him, and how G. K. Willard acquired any interest in said premises, that the title of the applicants to the premises claimed will be considered sufficient. It is also urged that the required amount of five hundred dollars had not been expended upon the claim prior to the date of the application for patent.

The testimony shows that said applicants had expended upon the claim about two hundred and forty dollars prior to their application for patent, and about two hundred and seventy since.

In addition to this, it appears from the evidence submitted, although the testimony is somewhat contradictory, that Woodward and Walsh, in 1867, had control of the Chicago mine, which adjoins this claim on the southwesterly end; that an agreement was made between Woodward and Walsh, and the claimants of the first extension north of the Chicago mine, permitting Woodward and Walsh to construct a tunnel through the claim under consideration to the Chicago mine, and granting them certain dumping privileges in consideration of which the first extension north of the Chicago claimants were to have an interest in said tunnel. It also appears that Woodward and Walsh expended about fifteen hundred dollars upon this tunnel, and performed no more work upon it; that, in the year 1874, E. W. Roberts, the then superintendent of the Chicago mine, under a similar agreement to that made with Woodward and Walsh, prosecuted work upon said tunnel and extended the same about fifty or sixty feet. Although said applicants had not expended upon their claim the required amount in *cash* prior to the date of their application for patent, I am of the opinion that the expenditure upon said tunnel should be considered as expenditure upon this claim as well as upon the Chicago, in accordance with the terms of said agreement.

Said protest is accordingly overruled, and you will allow said application for patent to proceed.

SURFACE-GROUND.

No patent can issue for a vein or lode without surface-ground, and as the surface which overlies the apex of a vein or lode discovered in a tunnel can only be ascertained by sinking a shaft or by following a lode up on its dip from the point of discovery, no survey of such a lode will be made until the exact surface-ground is first ascertained as above.

*Commissioner Williamson to Surveyor-General Campbell, Denver, Colorado, August* 31, 1877.

In your letter of the 7th inst., you inquire how survey shall be made of vein or lode-claims discovered in a tunnel.

Section 2323 of the Revised Statutes of the United States provides that the owners of a tunnel run for the development of a vein or lode, or for the discovery of mines "shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface."

Section 2320 Revised Statutes provides that "no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located," and declares the width of surface-ground which may be embraced by a location.

Section 2322 provides that locators so long as they comply with the laws of the United States and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or

apex of which lies inside of such surface lines extending downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location; * * * * and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Section 2324 requires that all locations "must be distinctly marked on the ground, so that its boundaries can be readily traced."

Section 2325 provides that a patent for any *land* located for valuable deposits may be obtained in the manner therein provided by any person, association, or corporation authorized to locate a claim who have claimed and located a piece of land for such purposes."

This section also requires the plat and field-notes to show "accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground," and makes it the duty of the applicant to post a copy of the plat and notice upon the "land embraced in such plat."

From the foregoing provisions of law it will be seen that no patent can issue for a vein or lode without surface-ground, and as the surface which overlies the apex of a vein or lode discovered in a tunnel can only be ascertained by sinking a shaft or by following a lode upon its dip from the point of discovery, a survey of a lode of this kind cannot be properly made until it has been definitely determined as above indicated what portion of the public domain overlies the apex of such lode.

### WOMEN AS LOCATORS.

*Commissioner Williamson to Register and Receiver, Eureka, Nevada, November* 13, 1877.

The law makes no distinction in this regard on account of sex.

Mining-claims may be located and held by either males or females upon compliance with law.

### J. H. RUSSELL LODE.

*Commissioner Williamson to Surveyor-General Mason, Helena, Montana, November* 30, 1877.

It is urged that a copy of the notice of location did not accompany the application for survey.

A certified copy of the location notice is shown to be on file in your office, but the date of the filing of the same in your office is not shown.

In all cases a certified copy of the location notice from the office of the proper recorder should accompany the field-notes made by the deputy.

There *may* have been an irregularity *in regard to the time* of filing the copy of the notice of location in your office, but as it is on file in your office the surveyor-general would not be authorized to withhold his approval of said survey on this account.

It is also urged that the labor and improvements upon said claim do not exceed the sum of five hundred dollars.

Section 2325 of the Revised Statutes of the United States requires the claimant at the time of filing his application for patent, or at any

time thereafter within the sixty days of publication, to "file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors.

In the case under consideration, if you are not satisfied from the evidence on file that the required amount has been expended upon the said J. H. Russell lode by said applicant or his grantors, you will require further evidence upon this point before furnishing your certificate.

EXPENDITURE IN THE PAST.

*Commissioner Williamson to Wm. S. Merrell, Cincinnati, Ohio, Dec.* 13, 1877.

The fact that a large expenditure has been made upon a claim in the past will not relieve the claimant from the necessity of performing the required *annual* labor.

ACTUAL AND REQUIRED EXPENDITURE.

*Commissioner Williamson to Hon. A. A. Sargent, U. S. Senate, Dec.* 21, 1877.

A party who contributes his proportion of the *required* expenditures can retain his interest in the mine. If a party fails to contribute his proportion of the *actual* expenditures upon a mining-claim, the remedy must be sought elsewhere than in this office.

TIMBER ON TUNNEL SITES.

*Commissioner Williamson to John Hunter, Washington, D. C., January* 16, 1878.

It will be seen that where there has been a total abandonment of, or a failure to prosecute, work on a tunnel for six months, the party or parties claiming such tunnel forfeit all right to the *undiscovered* veins on the line of such tunnel.

Should either of the parties claiming such tunnel refuse or fail to contribute his proportion of the expenditures required by section 2324 upon a *lode owned by them*, or in running a tunnel for the purpose of developing a *particular lode or lodes owned by them*, the co-owners who have made the required expenditure may proceed against such delinquent co-owners in the manner provided in said section 2324.

You inquire if a company can claim all timber upon a tunnel-site. It will be observed that a tunnel-site under the law cannot exceed in length three thousand linear feet, and that its width is the *actual width of the tunnel* itself. A tunnel owner would have the right to the timber growing upon this tract so long as he complied with the law in running such tunnel.

THEODORE H. RECKER.

In case a mill-site, for which an application for patent is made, is alleged to be non-mineral in character, though embraced in an application for patent for a placer-claim, a hearing may be ordered to determine the facts in the matter, improvements, etc.

*Commissioner Williamson to Register and Receiver, Central City, Colorado, January* 25, 1878.

With your letter of the 10th inst., you transmitted the papers in case

of the application of Theodore H. Becker, for patent for the premises embraced by survey No. 299, as a placer claim.

On the 14th instant, you transmitted the papers in case of the application of the Sunshine Mining Company, for patent for lot No. 728, as a mill-site.

It is shown by the plat and field-notes that lot No. 728 is embraced within the exterior boundaries of said lot No. 299.

Among the other papers forwarded are found sworn statements, in which it is alleged that the premises embraced by survey No. 728 are not mineral in character, and that the only improvements made or labor performed upon said premises during the last seven years were made and performed by said Sunshine Mining Company. That no mining has been done upon the premises embraced by lot 299, during the past seven years, except a prospect hole commenced by William Gilson and James Dunn, but never completed.

To the end that this office may be fully advised in the premises, you will fix a day for a hearing, and receive testimony upon the following points, viz:

1st. As to whether or not the premises embraced by lot No. 728 are mineral in character, and whether the same are more valuable for placer mining or mill-site purposes.

2d. What improvements have been made upon the premises embraced by lot 728, and by whom made.

3d. The extent and amount of improvements or labor upon the premises embraced by lot 299, and whether or not the improvements and expenditures were made by the applicant for patent for said lot 299, or his grantors.

It is desired that the evidence should be full, positive and explicit.

That the hearing may be attended with as little expense as practicable, you will direct the same to be held before some person authorized to administer oaths, at Idaho Springs, Colorado.

SURFACE-GROUND TO BE PAID FOR.

*Commissioner Williamson to Register and Receiver, Central City, Colorado, January* 26, 1878.

The papers in some instances coming up from your office, in the matter of applications for patents under the mining act, fail to disclose the *amount of surface-ground* for which patent is sought.

This is particularly true where the survey of the claim for which a patent is sought conflicts with a prior survey, a town-lot, or the claim of another party.

In each case the application and the published notices should state whether the applicant desires patent for the entire surface ground embraced within the exterior boundaries of his survey. In case a survey conflicts with a town-lot, garden, or road only, the applicant should be required to make payment for the entire area embraced by the exterior boundaries of his survey.

If, however, a survey conflicts with another survey made for a mining-claim, viz., for a lode-claim, a placer-claim, or a mill-site, the application and published notice should clearly state whether the applicant seeks patent for the surface-ground in conflict with such other survey.

WOODVILLE PLACER.

**Hearings may be ordered under the mining laws to ascertain necessary facts upon which to base a decision.**

*Secretary Schurz to Commissioner of General Land Office, February* 19, 1878.

The evidence now on file is *ex parte*, each claimant to the land asserting his superior right thereto, and, as said rights must depend on facts, you are instructed to order a hearing to ascertain, if possible, the truth in relation to the abandonment of the Nebraska claim.

If the applicants establish the fact that they obtained peaceable possession of the ground, have remained in possession of the same, and have the right of said possession, their application must be recognized. The claim may be defeated by establishing the fact that the ground was not subject to location, and any party has the right, as a protestant, to submit evidence on that point. Should it be established that, by compliance with the mining laws, and customs, and regulations, prior locators have the right of possession, the tract cannot be considered as subject to relocation, and the application must be rejected. The evidence must be confined to the question of abandonment, and the status of the parties will not be changed by the order for a hearing. [See Wildman quartz mine, Oct. 21, 1880.]

A hearing is not expressly provided for in the act of May 10, 1872, but I am clearly of the opinion that it is within your jurisdiction, under the supervisory power conferred upon you by the first section of the act of July 4, 1836, vesting in the Commissioner of the General Land Office control in all matters pertaining to the disposal of the public lands, to order hearings, when it is necessary, for the purpose of ascertaining the facts in a given case, without which it is impossible to render an intelligent decision.

*Extract from letter of Commissioner Williamson to Register and Receiver, Sacramento, California, March* 22, 1877, *in this case.*

Where parties fail to file their adverse claims within the time and in the manner provided by law, they cannot subsequently be permitted to assert an adverse claim before this office.

If Mr. Seymour has a right to any portion of said premises, which this office cannot take cognizance of by reason of his having failed to assert the same as provided by the statute, his remedy will be in a court of equity, to have the patentees declared trustees and compelled to convey the legal title. Stark *vs.* Starrs, 6 Wall., 402; Johnson *vs.* Towsley, 13 Wall., 72.

STATE OF CALIFORNIA.

**The State of California is not entitled to select and locate lands in lieu of those lost to the State by reason of their being mineral in character.**

*Commissioner Williamson to Register and Receiver, Shasta, California, April* 29, 1878.

The question is presented whether the State of California is entitled to select and locate lands in lieu of those lost to the State, by reason of their being mineral in character. The 7th section of the act approved March 3, 1853, (10th statutes, 244,) provides "that where any settlement

by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the States in lieu thereof."

Section 6 of the act approved July 23, 1866, (14th statutes, 218,) provides that said act of March 3, 1853, "shall be construed as giving the State of California the right to select, for school purposes, other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish and Mexican authority or by other private claims, or where such sections would be so covered if the lines of the public survey were extended over such lands."

No mention is made of these lands for such portions of the 16th and 36th sections as may be mineral in character, It is urged, however, by the attorneys for the State that *mineral lands are reserved for public uses*, and hence the State is entitled to lieu lands therefor.

The Hon. Attorney-General, in his opinion of 4th ultimo, (Copp's *Land Owner*, vol. 5, page 12,) states "that the words 'reserved for public uses," as employed in the 6th section of the act of 1866, were not meant to cover those lands which passed to the State of California under the swamp land act of September 28, 1850; that they refer solely to reservations made for the purposes of the General Government, and the same words occurring in the 7th section of the act of March 3, 1853, must be deemed to have the same meaning and scope."

This office must therefore deny the application of the State to select and locate lieu lands for such portions of sections 16 and 36 as are mineral in character.

SUTRO TUNNEL *vs.* OCCIDENTAL.

The word "developed" in the first section of the act of July 25, 1866, does not signify the same thing as "discovered;" but the words "discovered and developed," as used therein, refer to separate and distinct events, the happening of either of which was sufficient to perfect a grant of the right of way and its necessary consequences—the right to construct a tunnel was granted along any lode discovered or developed by the main tunnel.

The condition specified in the third section of said act, should not be inserted in any patents, except for the Comstock lode mines, unless it be made to appear *prima facie* that the mine or mines have been drained, benefited, or developed by the Sutro tunnel.

*Secretary Schurz to Commissioner of General Land Office, Aug.* 30, 1878.

I have considered the case of the Sutro Tunnel Company *vs.* The Occidental Mill and Mining Company, situated on the Brunswick lode, Silver Star mining district, Storey county, Nevada, on appeal from your decision of December 4, 1877, adverse to the Occidental company.

The facts of this case are as follows, viz: On September 10, 1873, the Occidental Mill and Mining Company made proof of their compliance with the requirements of the mining laws, and entered the lands embraced in the mill and mining-claims of said company, containing $34\frac{67}{100}$ acres in the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ section 33, township 17 N., range 21 E., and sections 4 and 9, township 16 N., range 21 E., Mount Diablo meridian. On June 5, 1875, Messrs. Shellabarger and Wilson, attorneys

for the Sutro Tunnel Company, filed the following protest against the issuance of patent for the Occidental mine, viz: The Sutro Tunnel Company, as assignee and successor in interest of A. Sutro, under the act of Congress of July 25, 1866, entitled "An act granting to A. Sutro the right of way, and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode in the State of Nevada, respectfully shows that the claim described as above in the application made and now pending in your office is either within two thousand feet of the tunnel of said company, and therefore, under the provisions of said act, not patentable, or else is within that district in which all claims or mines will be drained, benefited, or developed by said tunnel, and the owner of said claim holds the same subject to the condition named in the third section of said act.

"And said tunnel company hereby demands that if said claim is within the 2,000 feet aforesaid (such fact being ascertainable by the public records,) no grant or patent be issued therefor, and hereby protests against the issuing of any such grant or patent; or if said claim is not within the said limit of 2,000 feet, the said tunnel company hereby demands that the condition named in the third section of the act be inserted in any grant from the United States for said claim without the insertion of said condition."

On August 14, 1876, Messrs. Shellabarger and Wilson, on behalf of said tunnel company, filed a statement in which they alleged that the Occidental mine was on a lode which had already been drained by the Sutro tunnel, in consequence of which this mine, which for a long time had been flooded with water, had been thoroughly drained, which fact had been recently discovered; they therefore asked that a hearing be ordered to enable them to prove said allegations.

By your letter of August 19, 1876, a hearing was ordered before the local officers, to determine whether this mine had been drained, benefited or developed, by the Sutro tunnel. The hearing commenced before the local officers on October 4, 1876, but the testimony was not transmitted to your office until November 9, 1877. Much of this testimony was not signed by the witnesses, and lacked the *jurats* of the local officers, and you refused to consider it as evidence in the case. Your action in rejecting said testimony is approved for the reasons stated.

You decided that although the testimony did not conclusively establish the fact that said mine had been drained, benefited, or developed by the tunnel, the tunnel company had nevertheless made out a *prima facie* case, and were entitled to have the condition contained in the 3d section of the Sutro tunnel act of July 25, 1866, inserted in the patent to be issued for said mine, and the right of the tunnel company to royalty could then be settled by the courts.

On February 25, 1869, your predecessor, Mr. Commissioner Wilson, addressed a letter to Mr. Sutro, in which he discussed at length the rights and privileges granted by the tunnel act of July 25, 1866, and held that the only mines or lodes affected by said act were the following:

"1. The mines on the Comstock lode. 2. Those lying within 2,000 feet of the proposed line of said tunnel. 3. Such new lodes as may be discovered or developed by the construction of the tunnel, the existence of which remained unknown until thus brought to light." This decision was affirmed by my predecessor, Secretary Cox, on July 5, 1870.

It is contended by counsel for the mining company that the above-mentioned decision is final and conclusive against the tunnel company, upon the points raised in this controversy, and that said questions are *res judicata*.

Mr. Bouvier (2 Law Dict., p. 465) states the law of *res judicata* to be as follows: "In order to make a matter *res judicata* there must be a concurrence *of the four conditions* following, viz: 'Identity of the thing sued for, identity of the cause of action, identity of the persons and parties to the action, identity of the quality of the persons for or against whom the claim is made.'"

The records of your office show that the decision of Commissioner Wilson was drawn out by letters from Mr. Sutro, relative to his rights under the tunnel act. The Occidental Mill and Mining Company was not a party to that proceeding, and is not, therefore, estopped by it; neither can said company take advantage of said decision by way of estoppel, because it was a stranger to the record.

The questions involved in this case may be briefly stated as follows, viz:

1. Has the Sutro Tunnel Company proven that the Occidental mine has been drained, benefited, or developed by its tunnel?

2. If the proof shows that the mine has been drained, benefited, or developed by said tunnel, but that it is located outside of the limit of 2,000 feet named in the act of July 25, 1866, is the tunnel company entitled to have the condition contained in the 3d section of said act inserted in the patent to be issued for said mine?

The testimony in this case shows that the northerly end of the Occidental mine is situated about 3,100 feet in a southerly direction from shaft No. 3 of the Sutro tunnel; that the trend of said mine is nearly north and south, the dip to the east, and that the strata of the country run nearly north and south; that said mine is worked through two tunnels; that in 1872 several miner's inches of water (174,054 gallons or 20,333 cubic feet each) flowed from the lower of those tunnels, and was used for milling purposes by the Occidental company; that when the pumps were at work at shaft No. 3 of the Sutro tunnel there was a marked diminution in the flow of water in said mine, and that the mine has now become dry; that shaft No. 3 has been sunk to the depth of 459 feet, but not to the level of the Sutro tunnel.

It is also shown that in running the second tunnel of said mine, water was encountered at about 800 feet, where the ledge was struck; that there is a seam of clay from 3 to 4 feet in thickness, very close to the east casing of said mine, and that in running the Sutro tunnel similar clay was taken out; that the mouth of the second tunnel of said mine is situated about 5,000 feet from shaft No. 3 of the Sutro tunnel, with mountains and valleys intervening. The level of the Sutro tunnel is shown to be about 1,600 feet below the upper croppings, and about 1,200 feet below the second tunnel of said mine; it is also shown that large quantities of water were encountered in the Sutro tunnel from a point 1,400 feet east to a point 900 feet west of shaft No. 3.

While the testimony presented does not show conclusively that said mine has been drained, benefited, or developed by said tunnel, I agree with you in the conclusion that it does show *prima facie* that said mine

has been drained, although this conclusion is reached only by tracing effects to what must be considered their real causes.

Upon the second proposition it is claimed by counsel for the tunnel company that said condition must be inserted, because said company is authorized to run a branch tunnel on the Brunswick lode.

The first and third sections of the act entitled "An act granting to A. Sutro the right of way, and granting other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode in the State of Nevada," approved July 25, 1866, are in the following words, viz:

"*Be it enacted, etc.*, That for the purpose of the construction of a deep draining and exploring tunnel to and beyond the 'Comstock lode,' so called, in the State of Nevada, the right of way is hereby granted to A. Sutro, his heirs and assigns, to run, construct, and excavate a mining, draining, and exploring tunnel; also to sink mining, working, or air-shafts along the line or course of said tunnel, and connecting with the same at any point which may hereafter be selected by the grantee herein, his heirs or assigns. The said tunnel shall be at least eight feet high and eight feet wide, and shall commence at some point to be selected by the grantee herein, his heirs or assigns, at the hills, near Carson river, and within the boundaries of Lyon county, and extending from said initial point in a westerly direction seven miles, more or less, to and beyond said Comstock lode, and the said right of way shall extend northerly and southerly on the course of said lode, either within the same, or east or west of the same; and also on or along any other lode which may be discovered or developed by the said tunnel."

"SEC. 3. *And be it further enacted*, That all persons, companies or corporations, owning claims or mines on said Comstock lode, or any other lode drained, benefited, or developed by said tunnel, shall hold their claims subject to the condition (which shall be expressed in any grant they may hereafter obtain from the United States) that they shall contribute and pay to the owners of said tunnel the same rate of charges for drainage or other benefits derived from said tunnel or its branches, as have been or may hereafter be named in agreement between such owners and the companies representing a majority of the estimated value of said Comstock lode, at the time of the passage of this act." (14 Statutes at Large, pp. 242, 243.)

Under the first section, I think it is clear that neither the tunnel nor its branches can be lawfully constructed along any lode except where the right of way is granted. By the words "and also on or along any other lode which may be discovered or developed by the said tunnel," the right to construct branch tunnels is made contingent upon either the discovery or development of a lode other than the Comstock.

The record shows that the Brunswick lode was discovered many years before the passage of the act of July 25, 1866, and the Occidental mine was located thereon in March, 1863. This lode was not, therefore, "discovered" by the tunnel. This narrows the inquiry to the single question whether the Sutro tunnel has "developed" the Brunswick lode.

Mr. Commissioner Wilson was of the opinion that the word "developed," as used in the first section of the act above quoted, was simply

interpretive of the word "discovered," and signified one and the same thing. I am unable to agree with Mr. Wilson's construction of this section. The words "discovered or developed," as used therein, have reference, in my opinion, to separate and distinct events, the happening of either of which was sufficient to perfect a grant of the right of way, and its necessary consequences. Many lodes had already been discovered on the line of the projected tunnel at the time the act was passed, and it is not to be presumed that the law-makers by the use of the word "discovered" had reference to them, or deemed them capable of discovery by the Sutro tunnel, yet there was every reason for believing that they might be developed thereby. If the word "discover" did not refer to known lodes, and the words "or developed" are subordinate to and interpretive of that word, it follows as a logical sequence that the words "and also on or along any other lode which may be discovered or developed by said tunnel," granted no right of way except along blind lodes discovered in the tunnel. Such a construction would be equivalent to a nullification of this important part of the grant. It cannot be doubted that a known lode, when intersected by the main tunnel, might be greatly developed thereby; and if it was so intersected and developed, there can be no reasonable doubt that the right of way was granted for the construction of a branch tunnel along it, and the right to royalty would necessarily follow when the several mines located thereon were drained, benefited, or developed thereby.

I am of the opinion, therefore, that the right to construct a tunnel was granted any lode discovered or developed by the main tunnel, and that this right cannot be restricted unless there is something in the act which in terms, or by necessary implication, limits its operation. That such limitation does not exist is clear, I think, from the language used in the third section of the act, which provides that "all persons, companies, or corporations, owning claims or mines on said Comstock lode, or any other lode drained, benefited, or developed by said tunnel, shall hold their claims subject to the condition," etc. There is nothing in this language to indicate a limitation of the right of the Sutro Tunnel Company to extend their explorations. On the contrary, the language seems to imply that those explorations may be extended to any distance, and that all persons, companies, or corporations, whose mines are drained, benefited, or developed thereby, shall be liable to pay the royalty agreed upon in the stipulation mentioned, provided always that the lode was discovered or developed by the main tunnel. The word "branches" indicates that it was contemplated that more than one branch tunnel would be run; otherwise the word "branch" would have been used. The fact, therefore, that the Occidental mine is situated more than 2,000 feet from the main tunnel, will not prevent the Sutro Tunnel Company from collecting its royalty from the owners of said mine, providing it shall conclusively establish the fact that said mine has been drained, benefited, or developed thereby; and while it is true that the testimony in this case does not conclusively show that the Brunswick lode was cut by the Sutro tunnel, nor that the Occidental mine has been drained, benefited, or developed thereby, still it does appear *prima facie* that said lode was cut by the Sutro tunnel, and that it has been drained thereby; and as there is no limitation in the act as to the distance at which mines

shall be situated from said tunnel, if drained, benefited, or developed thereby, which would exempt them from the condition of the third section, I am of the opinion that Mr. Sutro, his heirs and assigns, are entitled to have the condition provided in the third section inserted in the patent for said mine, when the same issues.

Counsel for the Sutro Company urge that the condition prescribed in the third section shall be inserted in all patents for mines situated within a reasonable distance of said tunnel, whether located upon the Comstock lode, or some other lode, and whether within or without the limit of 2,000 feet named in the act.

I am unable to concur in this view. The right to royalty to Mr. Sutro, his heirs or assigns, was granted on the condition that the owners of mines should pay a certain royalty, providing their mines were drained, benefited, or developed by the proposed tunnel. If the mines are not drained, benefited, or developed by said tunnel, the act does not give to Mr. Sutro, his heirs or assigns, the right to collect any royalty. Whether the Sutro Tunnel Company is entitled, therefore, to such right must always be a question of fact to be established by proof; and while it is true that the condition prescribed in the third section of said act should be inserted in patents issued for mines on testimony established *prima facie* that said mine has been drained, benefited, or developed, still I am of the opinion that said condition should not be inserted in any patents except in patents for mines located upon the Comstock lode, unless it be made to appear *prima facie* that the mine or mines have been drained, benefited, or developed by said tunnel.

### X SULPHUR MINE AND SULPHUR KING MINE.

A survey of a mining-claim made *prior* to date of *location* thereof, cannot be regarded as the official survey contemplated in section 2325, nor should it receive the approval of the U. S. surveyor-general.

The only survey recognized as official by the statute is one made *subsequent* to date of location.

*Secretary Schurz to Commissioner of General Land Office, September* 6, 1878.

You further stated that "from the foregoing it will be seen that but one survey was made of said claim, and this prior to and for the evident purpose of securing description of the location. There certainly can be no legal objection to a locator taking this precaution to secure an accurate description of the premises he desires to appropriate by location."

The statute requires that the survey and plat above specified shall be made subsequent to the location. This is manifest, I think, from the further provision of the section, that the claimant shall, within the sixty days of publication, file the certificate of the surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors. The surveyor-general should derive the information upon which to base his certificate from his deputy who makes the actual survey and examination upon the premises.

I am of the opinion that your decision to the effect that a survey made prior to date of location might receive the approval of the surveyor-general, and thus become the official survey contemplated in section

2325, upon which a patent might issue, is contrary to the intent of the law, and is erroneous.

While the application for a patent for a claim thus surveyed should not be rejected solely on account of said irregular proceeding, I am of the opinion that, before a patent issues, an actual survey of the claim on the ground should be made subsequent to the recording of the notice of location, as provided by law.

MIDDLE POINT.

Rule for determining the middle point of a vein, from which the lateral measurements are to be calculated.

*Commissioner Williamson to Register and Receiver, Helena, Montana, September* 28, 1878.

The law, section 2320 United States Revised Statutes, provides that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface."

When the vein outcrops at the surface, there can be no question as to the point from which this lateral measurement must begin. When the discovery-shaft develops the vein at some distance below the surface, and the locator does not determine by any further prospecting that the nearest actual surface point is elsewhere, and the fact does not otherwise appear, I am of the opinion that the point of the vein so discovered must be assumed to be the middle of the vein, and the lateral measurements be calculated therefrom.

The law is mandatory, and contemplates that but three hundred feet of surface-ground shall be taken on either side of the vein; and a compliance with the law necessitates the fixing of the point from which these measurements shall begin. I think the rule above indicated is the only one practicable. In this case the width of the claim on the northerly side is more than three hundred feet from the discovery opening, and the plat and field-notes have this day been returned to the surveyor-general for correction in said particular.

TUNNEL LOCATIONS AND TUNNEL LODES.

*Commissioner Williamson to David Hunter, Deadwood, Dakota, October* 12, 1878.

In reply to your letter of 30th ultimo, asking my construction of the words, "which were not previously known to exist," found in section 2323 Revised Statutes of the United States, and whether the owners of a tunnel are required to stake off and survey each and every lode, etc., I have to advise you that section 2323 contemplates the running of a tunnel "for the development of a vein or lode, or for the *discovery* of mines;" and the right of possession of all veins or lodes within three thousand feet from the face (or opening) of such tunnel, "*on the line thereof* not previously known to exist, *discovered in such tunnel to the same extent as if discovered from the surface*," is granted to the owner of such tunnel.

The *line* of such tunnel is held to be the width thereof, and no more, and upon this line only is prospecting for blind lodes prohibited while the tunnel is in progress.

The words, "not previously known to exist," refer to undiscovered veins or lodes.

The proprietors of the tunnel are required to give proper notice of their tunnel location at the time they enter cover, by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving names of the tunnel proprietors; the actual or proposed course of the tunnel; the height and width thereof; the course and distance from such point of commencement to permanent, well-known objects in the vicinity by which to fix its locus; and at the time of posting said notice the owners must establish the boundary lines of the tunnel by stakes or monuments placed along such lines at proper intervals to the terminus of the three thousand feet from the point of commencement within the lines so marked. Prospecting for lodes not previously known to exist, is prohibited while work on the tunnel is being prosecuted with reasonable diligence. When a lode is struck, the surface-ground which overlies the apex of the mine must be ascertained, and the claim then duly located as if discovered from the surface. Manifestly the discoverer should ascertain what surface-ground covers his lode, and for his own protection stake off his claim; and this is necessary on each lode discovered.

The tunnel is a means of discovery. When the lode is discovered, the tunnel proprietor must proceed in locating his surface-ground, staking off the same, posting notice, recording, etc., as if the mine were discovered from the surface.

TOWNSITE *vs.* PLACER.

In cases of contest between the occupants of a townsite and the placer mineral claimants to the land so occupied, if the claim is a surface-claim, and its location was prior to townsite occupation, no adverse or conflicting right having been acquired by the town or by individual settlers who went there with record notice of the ownership of said placer-ground, the application for mineral patent should be allowed, and no exception of any town rights should be inserted in said patent.

*Commissioner Williamson to Register and Receiver, Fairplay, Colorado, October* 26, 1878.

I have examined the record of testimony submitted at a hearing in your office in the matter of a protest of Thomas Kemp against Thomas Starr's application for a patent to the "Starr Placer" claim. On allegations by Thomas Kemp *et al.*, that the land involved in said application was non-mineral in character, you were authorized to hold a hearing to determine the fact. This hearing was commenced July 30, 1878, and the record was forwarded with your letter of 6th of September last.

In the trial it was sought by Kemp *et al.*, to show that the land was non-mineral, and of more value for a townsite than for mining purposes, the claim of Starr being within the limits of the town of Leadville.

The weight of testimony shows that all the land embraced in this claim was regarded as placer-mining ground as early as 1860; that it was prospected with favorable results in different localities; that it has not all been worked because of the limited supply of water and want of proper facilities; that "California Gulch," which is a part of this claim, and lies on the southerly portion thereof, has been worked for a long time, and a large amount of gold taken therefrom; that placer-mining is being extended from said Gulch northwardly towards the settled portion of the town; and that, while gold has been found in all parts of this

claim, no one has opened a shaft on the northern part of the claim, which has been sunk to bed-rock, and it is manifestly impossible to estimate with any certainty the value of that part of the claim as mineral land; yet, that it is mineral land of more or less value, is clearly established by the record. It also appears that it is not feasible to work the northern portion of the claim until after the lower portion shall have been worked out; it shall be reached by slow approaches in the regular progress of operations, which are gradually being extended from California Gulch towards the north; and hence the fact that it has not been worked cannot have the effect of raising even a presumption of its non-mineral character. It also appears that a portion of this claim was purchased by the St. Louis Smelting and Refining Company, by A. R. Mayer, its agent, and that expensive reduction works have been erected thereon. This enterprise, together with the reputation of the surrounding country for its mineral resources, has, within the last few months, induced a sudden influx of population, whose residence or occupancy will doubtless depend upon the mining prosperity of the locality. The evidence shows that there are probably about 1,200 inhabitants in Leadville.

In order to prevent the land in this claim being "jumped," and its proprietors dispossessed to the extent of such occupancy, lots for building purposes were laid out on the northern part of the survey, and various persons permitted to build thereon, on certain considerations, agreements being executed to convey perfect title on receiving a patent from the United States for the claim.

It seems to have been generally conceded that this mining claim was in all respects legitimate, and that title to no part thereof could be derived from any party except through the proprietors. This was evidently the understanding upon which all sales and agreements were made. Within the last few months certain parties have sought to obtain a foothold on the land embraced in this claim by building thereon without authority. It appears, however, that most of such persons were summarily removed.

Mr. Kemp, protestant, went upon the northern part of this claim, whether by any proper authority does not appear, and erected a house, which, from the evidence, is used for a drinking and gambling saloon and "dance-house." It appears that there was opposition to his building, and that he then opposed the claim of Starr. It is in the evidence that Kemp offered to withdraw his protest on condition that the owners of the placer-claim would give him title to certain lots thereon. This is not contradicted, and is to a degree an indication of Kemp's faith in the title thus sought to be derived through the mineral claim.

The facts which are clearly established by the proof are: 1st. That the land in question is mineral. 2d. That the mineral claims represented by Starr had their inception long prior to the occupation of any portion of said land as a townsite. 3d. That a large amount of money has been expended thereon in developing the mine, in the construction of reduction works, and in bringing water from a distance to work the claim, and that the development of the mine is proceeding in good faith.

From these facts I conclude that the application of Thomas Starr, when duly perfected, should be allowed, and that no exception of any town rights should be inserted in the patent, for the reason that his

claim is a surface-claim, and is anterior to townsite occupation, no adverse or conflicting right having been acquired by the town or by individual settlers, who went there with record-notice of the ownership of said placer-ground. It is proper to add that there is no opposition to Starr's application by the town authorities of Leadville.

The affidavit of Thomas Starr, stating in detail all charges and fees paid by him for publication and surveys, together with all fees and moneys paid to the register and receiver of the land-office, in the matter of his said application for patent, will be required.

SAME ON APPEAL.

Land that is mineral is subject to location only under the provisions of the mining law, without reference to the relative value of a portion of the tract for townsite purposes.

*Secretary Schurz to Commissioner of General Land Office, March* 4, 1879.

I have considered the case of Thomas Kemp *et al.*, *vs.* Thomas Starr, involving mineral application No. 177, Fairplay, Colorado, on appeal from your decision of October 26, 1878, holding that the land in question is mineral in character.

At the hearing held, evidence as to the character of the land was submitted, and also as to its relative value for mining and townsite purposes. The evidence of the numerous witnesses was, as is usual in such cases, conflicting and contradictory.

After a careful consideration of the same, I concur with you, that the land embraced in the application is land which should, under the provisions of section 2318 Revised Statutes, be held as "valuable for minerals," and should be reserved from sale, except as provided by law regulating the sale of mineral lands.

In my opinion, the evidence submitted as to the relative value of the land for townsite or mining purposes was improperly allowed. If the land is mineral, it was subject to location only under the provisions of the mining law, without reference to the relative value of a portion of the tract for townsite purposes.

CITIZENSHIP.

*Commissioner Williamson to Register and Receiver, Shasta, Cal., Nov.* 23, 1878.

In case an agent makes affidavit that each member of an *unincorporated* mining company is a citizen of the United States, it must be shown that he is such agent duly authorized by power of attorney, or otherwise, by *each* co-claimant to act for him.

ERRORS IN FIELD-NOTES.

*Commissioner Williamson to U. S. Surveyor-General, San Francisco, Cal., Dec.* 11, 1878.

In case errors appear in the sworn field-notes of a deputy U. S. mineral surveyor, it is not proper for the register and receiver or the General Land Office to correct the same. Such correction should be made by the deputy himself. Under section 2334 of R. S., only *competent* surveyors should be appointed.

ILLEGAL RELOCATION.

*Commissioner Williamson to Register and Receiver, Fairplay, Col., Dec.* 13, 1878.

On the 12th October, 1871, certain parties located 3,000 linear feet of the Peerless lode; by a continuous line of conveyances the Colorado Mineral Land, Mining and Smelting Company became the owners, and on January 28, 1875, *relocated* 1,500 linear feet of said lode. On the 28th December, 1875, said company conveyed the premises to the applicant, who on March 10, 1876, relocated again 3,000 feet of said lode.

Held that the relocation of 3,000 feet was illegal, for the reason that the company making the conveyance having abandoned the original location of 3,000 feet, under act of July 26, 1866, and having made a new location of 1,500 feet, proceeded under the act of May 10, 1872, and their grantee could not make a location of a greater amount than was conveyed to him.

When 1,500 feet of a location of 3,000 feet, under act of 1866, are excluded from the claim by a relocation of 1,500 feet with new rights under act of 1872, the original location cannot be resumed by a second relocation of the whole.

NOTICE OF COMMENCEMENT OF SUIT.

**The failure of an adverse claimant to give to the register and receiver notice of the commencement of suit in court, while it may cause inconvenience to the delinquent, cannot work a forfeiture of his right. It is the duty of the defendant to prove that suit has *not* been commenced before making entry.**

*Commissioner Williamson to Register and Receiver, Marysville, California, December* 19, 1878.

It seems that you allowed the entry of Hewitt, January 12th, 1878, because "no notice or other evidence showing that suit had been commenced in court by the adverse claimants had been filed in this (your) office."

Your action was erroneous and in violation of law. Section 2326 U. S. Revised Statutes, provides that upon filing of adverse claim, and commencement of suit in the proper time, all proceedings shall be stayed, except the publication of notice, and making and filing the affidavit thereof.

Your action is based on failure of notice to you that suit had been commenced, while entry should have been allowed only on proof that suit had *not* been commenced.

It was the plaintiff's duty and interest to advise you by official proof that he had commenced suit, but it was the defendant's duty to prove that no suit had been commenced before making entry.

The commencement of suit is a compliance with the law which is mandatory as to subsequent proceedings in your office. The requirement that plaintiff shall notify you of commencement of suit is an office regulation, failure to observe which, while it may result in inconvenience to a delinquent, cannot work a forfeiture of right, or justify this office in ignoring the law.

In this case it appears that four days prior to making the entry the defendant appeared in court, and filed his demurrer, thus indicating that he designedly availed himself of an entry which the law at that time forbade.

The entry is hereby held for cancellation, to await the adjudication of said court or other legal adjustment of the controversy.

LODE AND PLACER NOT CONTIGUOUS.

*Commissioner Williamson to Henry O'Conner, Jr., Deadwood, Dakota, January* 10, 1879.

In reply to your letter asking "whether or not a patent will issue including a placer and ledge-claim when said claims are not contiguous, and the ledge is entirely without the placer location," you are informed that a placer and lode-claim, situated as aforesaid, cannot be embraced in the same patent or the same proceeding for patent.

PLACER WITHIN INDIAN RESERVATION.

*Commissioner Williamson to A. B. Knight, Virginia City, Montana, January* 20, 1879.

A placer-claim, which has been mined several years, lying just within the boundary of the Crow Indian reservation, cannot be surveyed and patented. The parties so engaged in mining upon the reservation proceed in violation of law.

OVERLAPPING AND TRIANGULAR SURVEYS.

*Commissioner Williamson to Fred. C. Morse, Fairplay, Colorado, January* 21, 1879.

I am in receipt of your letters of November 28th and December 8th, 1878, asking, in substance, whether it will be in accordance with the instructions of this office, requiring the end lines of lode-claims to be in all cases parallel to each other, to make a survey whereof one of the ends overlaps a previously approved survey; and you send a diagram illustrating your question, which shows the end of one survey overlapping the end of another patented survey. You state that the portion covered by both surveys was excluded by a clause in the field-notes.

You are informed that the proceeding detailed as above was erroneous. The end lines of the second survey were not parallel when patented. The law gives the owner of a lode a right thereto for a certain length, and should his lode dip under the adjoining side lines of his claim, he may, without entering upon the surface, prosecute the dip under such adjoining land, but is restricted in so doing to the one lying within the extension of the parallel end lines. Now, by an examination of the diagram made by you, it will be at once perceived that to keep within the extension of the end lines would, on entering adjoining land, gradually shorten the length of his lode on one side, and lengthen his lode on the other, and probably, at least possibly, conflict with rights of other parties assured to them by patent, or under the law.

You also submit a diagram in the form of a triangle, and ask whether such surveys will be approved by this office. On this point I would say that in no case can a triangle, *which embraces the entire lode or vein claimed*, be approved unless the lode itself extends into and fills the point in the acute angle, and then only when adverse rights, existing on the 10th day of May, 1872, render it necessary. See section 2320, U. S. Revised Statutes, which precludes a restriction of the width to less than twenty-five feet on each side of the middle of the vein at the surface.

Neither can the surface-ground extend beyond the end of the lode in any instance.

Where a lode intersects another claim and extends within a prior survey or location, it may be patented to the length allowed by law, and if the end of the lode is found within such prior location, the surface-ground may close upon the prior survey, *provided* the extension of the end line within such prior survey, *parallel to the other end line*, would not exclude any portion of such surface-ground.

Where a survey of the kind last above mentioned results in a triangle formed against the prior survey, the shape of the same, subject to the restrictions, as to the surface-ground extending beyond the lode before named, will not be objectionable, but this will not apply where the lode embraced by the subsequent survey is merely the extension or continuation of the same lode on which prior location is made, for in such case the lode itself cannot extend within the prior location.

AMERICAN HILL QUARTZ MINE.

A party in possession is not compelled to purchase mining land from the government, and if he complies with the laws of possessory right, his title is as good for all practical purposes as if secured by patent.

When the purchase is completed, and the certificate issued, the purchaser at once acquires a vested right, of which he cannot be subsequently deprived, and the land ceases to be a part of the public domain. There is a part performance of the contract, which entitles the purchaser to the specific performance of the whole, without further action on his part. An entry made is equivalent to a patent issued.

*Secretary Schurz to Commissioner Williamson, March* 4, 1879.

I have considered the case of Clarence Smith and F. W. Clute *vs.* Peter Vanclief, Charles Heintzen, and John C. Young, involving the right to lots 37, 38, and 39, town. 19 N., range 11 E., M. D. M., Sierra mining-district, Sacramento land-district, California.

The facts relative to this case are as follows: On June 1, 1877, Vanclief, Heintzen, and Young made application for patent for the "American Hill Quartz Mine," situated in town. 19 N., range 11 E., M. D. M., (in the certificate and receipt erroneously described as range 9 E.,) and described by the official survey thereof, made by Deputy Surveyor Charles W. Hendel, in November, 1876, as lots 37, 38, and 39, containing 2,288.22 feet in length by 250 feet in width on each side of the lode. No adverse claim was filed during the period of publication, and an entry was allowed and patent certificate issued in the name of said parties on January 16, 1878. After said entry was made, viz., on April 28, 1878, Clarence Smith claims to have relocated lots 38 and 39, and F. W. Clute claims to have relocated lot 37, pursuant to the provisions of section 2324 of the Revised Statutes of the United States, and it is alleged on behalf of said relocators that no labor was performed or improvements made on said claim by Vanclief *et al.*, on January 1, 1875, nor at any time subsequent thereto until April 28, 1878, when said relocators entered thereon and ascertained that a lode, ledge, or vein of gold-bearing quartz existed therein, whereupon they relocated and claimed the same, and gave notice of their said relocation and claim in the manner required by law. Said relocators, therefore, ask to have the application for patent of Vanclief *et al.* dismissed, and for such other and further relief as the circumstances of the case demand.

By your decision of September 26, 1878, the relocations of Smith and Clute were adjudged to be illegal and void, and their applications for recognition were dismissed. In this decision you confined the scope of your inquiry to the consideration of the legal rights of Smith and Clute, as relocators, and did not pass upon the merits or regularity of the entry of Vanclief *et al.*, but left all questions relating to the regularity of said entry for examination and adjustment when the entry was reached and examined on its merits in its regular order. In this there was no error.

Messrs. Smith and Clute have attempted to relocate a mining-claim which has been entered and paid for, with full knowledge of the existence of the entry; and the theory of their case is, that they have a legal right to relocate a claim at any time prior to the issuance of patent or failure of the parties making the entry to perform the necessary labor, and make the necessary improvements thereon.

If the theory of the relocators is correct on this point, they have a standing as parties in interest for the purposes of this case, and it is not material whether the entry of Vanclief *et al.* was regular or irregular; but in so far as they seek to attack the regularity of the entry, and to contest matters arising prior to the time it was made, their *status* is that of protestants only, and they could have no right of appeal from your decision in any event.

As it would be bad practice for this department to take original jurisdiction over matters not involved in your decision, and not subject to appeal if they were involved, the questions relating to the regularity of the entry made by Vanclief *et al.* will not be considered.

That part of the statute under which the relocators claim which is material to the consideration of this case is in the following words, viz: [See part I., section 2324, page 3.]

By act approved June 6, 1874, (18 Stat., 61,) the time within which the first annual expenditure required to be made on claims located *prior* to May 10, 1872, was extended to January 1, 1875.

This case, therefore, presents the naked question of law, whether or not after a mining claim has been entered and paid for, it is subject to relocation by strangers between the date of entry and the date on which a patent is issued, in the event that the persons making the entry fail to perform the labor or make the improvements required by section 2324 of the Revised Statutes of the United States. It has already been stated that this inquiry would be confined to events occuring subsequently to the date of the entry of Vanclief *et al.*

The proof presented by Messrs. Smith and Clute, shows that no work was performed or improvements made by Vanclief *et al.*, between January 16, 1878, the date of the entry, and April 28, 1878, the date of the alleged relocation.

Admitting, for the purpose of the argument, that a mine can be relocated after entry, it is manifest that such relocation can only be made after forfeiture; and as no forfeiture can take place until one year after entry, it is clear that the proofs presented in this case are insufficient, and the relocations premature. On their own construction of the law, Messrs. Smith and Clute could have acquired no right to relocate prior to January 17, 1879, and then only in the event that Vanclief *et al.* should fail to improve it during the year subsequent to entry.

The consideration of this case might well be closed at this point, but as I think the interests of the government and those of mining claimants demand that the legal question should be disposed of, in so far as lies within the power of this department to do so, I deem it proper to proceed with the consideration of the question.

At the outset it is proper to remark that by the mining laws of the United States three distinct classes of titles are created, viz:

1. Title in fee-simple.
2. Title by possession.
3. The complete equitable title.

The first vests in the grantee of the government an indefeasible title, while the second vests a title in the nature of an easement only. The first being an absolute grant by purchase and patent without condition, is not defeasible, while the second being a mere right of possession and enjoyment of profits without purchase, and upon condition, may be defeated at any time, by the failure of the party in possession to comply with the condition, viz: To perform the labor or make the annual improvement required by the statute. The equitable title accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued. Stark *vs.* Starrs, 6 Wall., 418.

Section 2324 Revised Statutes, has reference solely to title by right of possession, and does not in any way conflict with titles acquired by purchase; for, in the latter case, both must be in one and the same person. A title by right of possession is the lowest grade of title known to the mining laws; the next is the equitable title which accrues upon purchase and entry, while the third and final grade is the fee-simple, which is acquired by patent, evidencing the legal title and merging therein both the possessory and equitable titles.

Where lands are acquired under the pre-emption laws, it sometimes occurs that the legal title may be in one person, and a superior equity in another; but this cannot occur under the operation of the mining laws, for all legal and equitable adverse titles and claims must be presented to and passed upon by the courts, prior to the issuance of patent, or be considered as stale and abandoned.

The question was expressly decided by Mr. Justice Field in the case of the Eureka Mining Company *vs.* Richmond Mining Company. (4 Sawyer, C. C. Reports, 318.)

The possessory right provided for by section 2324, Revised Statutes, may continue for an indefinite term of years, and can only be terminated by a failure of the claimant to comply with the terms of the statute, and an assertion of claim to the land by another; but there is nothing in the law which requires a party in possession to purchase the land from the government, and if he complies with the law relating to possessory rights, his title, for all practical purposes, is as good as though it were secured by patent.

Section 2324 provides, in terms, that a possessory claim may be relocated at any time prior to the issuance of patent, if the necessary labor or improvement shall be neglected for one year; but, "a person ought not to think, if he have the letter on his side, that he hath the law on all cases." (Plowden.) "No statute shall be interpreted so as to be inconvenient or against reason." (Cawdree's case, 5 Rep.)

"The words of a statute ought not to be expounded to destroy natural justice." (Story, p. 81.)

The purpose of the requirement of the law was to obviate an abuse which had assumed formidable proportions in the mining regions. In the early history of mining operations in this country, it was the universal practice of miners to assemble together and make laws for the government of the mining district where they resided. These laws were generally very liberal in the matter of possessory rights and titles, and great areas of land were covered by duly recorded mining-claims, upon which no work had been done or improvements made for a long series of years.

Under the rulings of the local courts, these claims operated as a cloud upon the title to the land, and retarded the progress and development of the mining industries of the country. In order, therefore, to put an end to this abuse, and encourage the purchase of the lands from the government, and the consequent establishment of permanent industries, Congress wisely provided that possessory rights should exist only as long as the specified amount of work was annually performed.

The object of the law being to encourage the purchase of mineral lands, it would be manifestly improper for this Department to so construe the law as to destroy the purpose which Congress had in view in enacting it.

The mining laws require certain acts, in the nature of conditions precedent, to be performed before an entry is made, and the validity of the entry is made to depend upon the facts existing at the time it is made, and not upon anything which the claimant may do, or omit to do, afterwards.

These precedent requirements are specifically set out in section 2325 Revised Statutes, and it is made your duty, in the regular order of business, to see that they have been complied with, and thereupon to issue a patent for the mine in accordance with the calls of the location and entry; yet it seldom occurs, owing to the great number of mining entries allowed and the gravity of the questions involved, than an entry can be examined and patented until months, and sometimes years, after it is made.

Such a construction would, in my opinion, be repugnant to the intent of the statute.

The true rule of law governing entries of the public lands, to which mineral lands form no exception, is that when the contract of purchase is completed by the payment of the purchase-money and the issuance of the patent certificate by the authorized agents of the Government, the purchaser at once acquires a vested interest in the land, of which he cannot be subsequently deprived, if he has complied with the requirements of the law prior to entry; and the land thereupon ceases to be a part of the public domain, and is no longer subject to the operation of the laws governing the disposition of the public lands. In such cases there is a part performance of a contract of sale which entitles the purchaser to a specific performance of the whole contract without further action on his part. When the proofs are made and the purchase-money paid, the equitable title of the purchaser is complete, and the patent when issued is evidence of the regularity of the previous acts, and relates to the date of entry, to the exclusion of all intervening claims.

In short, an entry made is in all respects equivalent to a patent issued, in so far as third parties are concerned.

In support of these views I cite the following adjudicated cases: Carrol *vs.* Safford, 3 Howard, 441; Landes *vs.* Brant, 10 Howard, 348; Lessees of French *et al. vs.* Spencer *et al.*, 21 Howard, 240; Witherspoon *vs.* Duncan, 4 Wallace, 210; Stark *vs.* Starrs, 6 Wallace, 418; Whitney *vs.* Frisbie, 9 Wallace, 187; Irvine *vs.* Irvine, 9 Wallace, 617; Barney *vs.* Dolph, Oct. Term, 1878, U. S. Sup. Court; Cruise on Real Property, vol. 5, pp. 510, 511.

As the doctrine is firmly established that where several concurrent acts are necessary to make conveyance, the original act shall be preferred, and all subsequent acts shall have relation to it, it is held that an entry made is equivalent to a patent issued, within the meaning and intent of section 2324 of the Revised Statutes. The attempted relocation of the tract in question by Messrs. Smith and Clute was void at its inception, and was properly rejected.

Your decision is affirmed for the reasons stated.

RECEIVER—EXPENDITURE.

The entry of a mine in the interest of the receiver of a district land-office is improper.

In estimating the $500 expenditures, essential to authorize entry, improvements made by former locators who had abandoned their claim cannot be included.

*Secretary Schurz to Commissioner Williamson, June* 23, 1879.

On April 24, 1876, Andrew M. Embry made application for patent for 1,500 linear feet on the Del Norte lode, Central City land-district, Colorado, and made entry of the same on August 22, 1876, per mineral entry No. 782.

On March 27, 1878, William H. Morgan filed affidavits in your office alleging that neither the applicant for patent nor his grantors had made the expenditures on said lode required by law to entitle him to a patent, and that the expenditures made by said applicant and his grantors did not exceed in value the sum of twenty dollars.

On April 9, 1878, you ordered a hearing to determine the value of the improvements made on said lode, by whom, and when made, and the testimony was taken before the clerk of the district court of Gilpin county, Colorado, in June, 1878.

On December 20, 1878, you decided that neither the applicant nor his grantors had made the necessary expenditures on the mine to entitle him to a patent, and you accordingly held his entry for cancellation; and he has appealed from your decision.

The proofs in this case show that the application for patent is based on a location made on January 1, 1876, by Edward W. Henderson, (receiver of the land-office,) and Robert B. Smock.

The abstract of title shows that on February 29, 1876, Smock conveyed his interest in the mine to Henderson, and Henderson deeded the mine to Andrew Embry on April 1, 1876.

Smock testified at the trial that he transferred his interest in the mine to Henderson for the purpose of facilitating the procurement of a patent; and Henderson testified that as he was receiver of the land-office, he doubted the propriety of making the entry in his own name,

and therefore conveyed to Embry, and that Embry was really acting as trustee for himself and Smock, and that they were the actual owners of the mine.

The testimony shows, and it is admitted by Henderson, that no improvements were made on the mine between the date of location and the date of entry.

On January 2, 1878, Embry, with the knowledge and consent of Henderson and Smock, leased the mine to Daniel R. Miller, who appears to have subsequently done about twenty dollars' worth of work on it.

Smock was a witness for Embry when he made his final proof and entry, and testified that the improvements made by Embry and his grantors on the Del Norte were worth not less than five hundred dollars, and that he (Smock) owned no interest whatever in said property—statements which are wholly untrue. The testimony in this case shows clearly:

First. That the conveyances from Smock to Henderson, and from Henderson to Embry, were fraudulent.

Second. That in the entry of this mine by the receiver of the local land-office, through his agent Embry, that officer was guilty of a direct violation of the order of this Department of August 3, 1876, and the instructions of your office of August 23, 1876.

Third. That the affidavit of Smock, dated April 24, 1876, wherein he stated that five hundred dollars' worth of improvements had been made on the Del Norte lode by Embry and his grantors, and that he owned no interest in the property, was false, and the entry was therefore based upon fraudulent proof in so far as relates to the value of the improvements made on the lode.

Fourth. That the statement of the deputy surveyor contained in the field-notes of survey, that five hundred dollars' worth of improvements had been made on the Del Norte lode by the claimant and his grantors, was untrue, although not intentionally so, as the deputy inadvertently included in his field-notes the improvements which had been made by other parties under locations which had been abandoned.

Fifth. That neither the applicant nor his grantors had done any work or made any improvements on the Del Norte lode between the date of location and the date of entry thereof, and that the entry is therefore illegal.

On the trial of this case, testimony was introduced to the effect that more than five hundred dollars' worth of work had been done on this lode some years ago, when it was claimed by various parties under former locations, and was known as the Jones lode and Doubloon lode, which said locations had been abandoned long prior to the time the Del Note location was made.

It was also shown that Smock had some years ago purchased an interest in the abandoned Jones lode, and it is sought to make the work done on the abandoned Jones location available as improvements made on the Del Note lode in the disposition of this case.

With reference to this question, it is only necessary to say that the Jones lode having been abandoned, and the claim relocated under section 2324 of the Revised Statutes, all rights which had been acquired

by the location and improvements of the Jones lode were lost by the abandonment of that lode, and no person, no matter what his relations may have been to the old location, can now claim any benefits arising from improvements made on it prior to abandonment. The claim of the applicants is based upon the location of January 1, 1876, and as it is clearly shown that the law had not been complied with, and that the entry was allowed on false and fraudulent proofs, there is no error in your decision holding it for cancellation.

IOWA *vs.* BONANZA.

A failure on the part of an adverse claimant to prosecute his suit to judgment with reasonable diligence, shall be a waiver of his claim.

The question of diligence in the prosecuting of a pending suit is as much a question for the determination of the court as any other question of law or fact which may arise in the progress of the case, and one which, after the court has acquired jurisdiction, should be left for its determination.

*Secretary Schurz to Commissioner Williamson, June* 25, 1879.

I have considered the case of the Iowa Mining Company *vs.* the Bonanza Mining Company, involving certain mineral lands in the Virginia mining district, Carson City land-district, Nevada, on appeal from your decision of October 11, 1878, adverse to the Iowa company.

The facts of this case, as they are made to appear by the record, are as follows: On January 11, 1876, the Bonanza Mining Company made application for patent for 593 linear feet on the Lucky Baldwin lode, together with 200 feet in width of surface-ground, situated in the Virginia mining-district, Storey county, Nevada, and gave due notice thereof by publication, and by posting a copy of the notice and plat on the claim in the manner prescribed by law.

On March 11, 1876, two adverse claims were filed against said application for patent, one by W. B. Murdock, and the other by the Iowa Mining Company. Suit was commenced by Murdock in the district court for the first judicial district of Nevada, on March 11, 1876, but this action was voluntarily dismissed by the plaintiff on November 13, 1876, as shown by the certificate of the clerk of said court.

On April 7, 1876, the Iowa Mining Company commenced suit on its adverse claim in the same court, by filing a complaint and causing a summons to be issued; and it is shown by a certificate of the clerk of said court, dated May 24, 1878, that service had not been perfected on the defendant, and no further steps taken by the plaintiff in the prosecution of said suit.

On this state of facts you decided that the Iowa Company had waived its adverse claim by a failure to prosecute said suit with reasonable diligence, and that the Bonanza Company was entitled to a patent for the land, on fully complying with the requirements of the mining law.

In this I think you erred. Section 2326 of the Revised Statutes provides as follows: "Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries and extent of such adverse claim; and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claim-

ant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment, and a failure so to do shall be a waiver of his adverse claim." Said section also provides for the filing of a certified copy of the judgment-roll, an entry of the land, and the issuance of patents in conformity with the decree of the court.

This statute provides in plain terms that a failure on the part of an adverse claimant to prosecute his suit to judgment with reasonable diligence, shall be a waiver of his claim; but it does not provide, either in terms or by necessary implication, that you shall decide what constitutes reasonable diligence, while suit is pending in court.

There can be no question but that the State court of Nevada has acquired jurisdiction over this cause, and it is equally clear that the object of the law was to require parties claiming an adverse interest in land included in an application for patent to try the right of possession, and have the controversy determined by the State courts before a patent was issued.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause." (Elliott *vs.* Peirsol, 1 Peters, p. 340.)

The question of diligence in the prosecution of a pending suit is as much a question for the determination of the court as any other question of law or fact which may arise in the progress of the case, and one which, after the court has acquired jurisdiction, should be left for its determination. I do not think it was the intention of Congress that you should decide what constitutes reasonable diligence in the prosecution of a suit pending in a court of competent jurisdiction, for such a proceeding would necessarily interfere with matters which the court alone should determine.

Under such a practice it might occur that you would hold that reasonable diligence had not been exercised, and issue a patent; while the court might hold otherwise, and give judgment for the adverse claimant; and the result would be a conflict of authority and a confusion of titles, which would compel the successful parties to resort to further expensive litigation by bill in equity to procure title to the land which had been adjudged to belong to them by the courts.

I am of opinion that the proper practice in cases of this character is for the defendant, if in his opinion the suit is not prosecuted with reasonable diligence to move the court to dismiss the case for want of prosecution, and, if the motion is granted, cause the judgment to be certified to your office, when a patent can be issued without conflict with the jurisdiction of the courts or the rights of the parties in interest.

Your decision is reversed for the reasons stated, without prejudice to the rights of either party; and further proceedings will be stayed to await the result of said suit.

ADVERSE CLAIM FILED ON SUNDAY.

In the absence of a law to the contrary, an adverse claim may be filed on Sunday or out of office hours if the local officers are willing to receive it; though they are not required to receive adverse claims or transact other business except during regular office hours.

*Secretary Schurz to Commissioner Williamson, July* 17, 1879.

I have considered the appeal of George A. Sayer and Samuel Goldstone from your decision of March 30, 1878, rejecting the adverse claim of the appellants to the application of the Hoosac Consolidated Gold and Silver Mining Company for a patent for 1,500 linear feet of the "Dolly Varden Mine," Secret Cañon mining district, Eureka, Nevada, for the reason that said adverse claim was not filed within the time required by law.

You held that "officers are not expected nor required to transact official business after office hours, nor to have their offices open for the transaction of business on Sunday. And as this adverse claim can only be considered as filed on Monday, the 17th of September, 1877, it must be rejected."

From the statement of facts presented in this case, it appears that the 60th day of publication of notice of the application fell on Sunday, September 16, 1877; that about 10 P. M. of the previous day Mr. Sayer presented his adverse claim and tendered fees for the filing of the same to the register of the land-office, who refused to receive said adverse claim or the fees for filing the same; that on the following day Mr. Sayer presented the adverse claim to the receiver of said land-office, who accepted it, filed it, and received the fees for the same.

While it is true that officers are not expected or required to transact business out of office hours or on Sunday, still there is no law of the United States prohibiting them from doing such business. Nor am I able to find any law of the State of Nevada which prohibits the transaction of ordinary business on the Sabbath day.

Both of said officers might properly have refused to receive such application either out of office hours or on the Sabbath day, but the receiver did receive the adverse claim and filed the same, and by so doing, if suit was commenced within the time prescribed by law, I am of the opinion that the rights of the appellants were protected. Your decision is therefore reversed.

ADELAIDE *vs.* CAMP BIRD.

Where mining locations cross each other, and there is reason to believe that a contest may arise in future, the rights of neither party should be prejudiced prior to a judicial determination thereof, by unnecessary *habendum* or *reddendum* clauses in the patent.

In this case, notwithstanding the applicants for patent have not entered and do not seek a patent for the surface-ground embraced in the opposing company's claim at the intersection of the two claims, yet as their vein may extend into the other party's land and not intersect the other party's vein, an excepting clause will be inserted in the patent as broad as the granting clause therein. Such excepting clause is given in full.

*Secretary Schurz to Commissioner Williamson, July* 21, 1879.

I have considered the application of Patrick Gallagher and Charles Gallagher for patent for the Camp Bird mining-claim, entry No 130 of

survey No 237, in the California mining-district, Fairplay land-district, Colorado.

The facts of this case are as follows, viz: A survey of said mining-claim was completed by Deputy Surveyor W. H. Bradt, on June 9, 1877, and approved by the surveyor-general of Colorado, on July 21, 1877. By said survey the Camp Bird claim is represented as a parallelogram 1,500 feet in length by 300 feet in width, and the amount of land contained within the boundaries thereof is represented as 10.277 acres. The survey of this lode crosses the "Adelaide lode" at nearly right angles, and the amount of surface-ground contained within the Adelaide claim at the point of intersection, is 2.972 acres. The preliminary proceedings for patent appear to have been in strict conformity with the requirements of the mining-law, and no adverse claim was filed or suit commenced during the period of publication.

On November 19, 1877, said applicants made entry of 7.305 acres of surface-ground of said mining-claim, being the exact amount of land contained within the survey thereof, after deducting the surface-ground contained in the Adelaide claim at the point of intersection, viz., 2.972 acres.

In the published notice of said application for patent, the amount of land applied for is stated as being 7.305 acres.

On August 12, 1878, counsel for the Adelaide Consolidated Silver Mining and Smelting Company filed in your office the protest of H. D. Cooke, president, and John R. Magruder, superintendent of the Adelaide company, in which it was alleged that the description of the Camp Bird claim, as shown by the official survey, was not sufficiently specific for the protection of the interests of the Adelaide company, and that it was quite possible that the Camp Bird company intended to take the land at the point of intersection of the two claims.

Said protestants also stated that important testimony had been prepared impeaching the regularity and good faith of the Camp Bird application, and asked that a clause be inserted in the patent issued on the Camp Bird claim, excepting and excluding the area in conflict with the Adelaide claim.

On October 18, 1878, counsel for the applicant for patent addressed a letter to your office, in which they stated: "Our survey, application, and entry all excluded the surface-ground in conflict with the Adelaide, and that such surface conflict may, in the usual terms, be excepted from our patent. No unusual clauses of reservation are therefore necessary, nor will they be accepted by us; and the right to ore at point of intersecting lodes, must necessarily, under the statutes, be left to judicial determination in event of future dispute upon point of priority."

On November 21, 1878, counsel for the Adelaide company submitted certain affidavits, wherein it was alleged that during the period of publication the owners of the Adelaide claim were assured by the owners of the Camp Bird claim, and by their attorney, that the Camp Bird claim was not intended to interfere with the Adelaide claim, or appropriate any part of the same, and that the priority of location of the Adelaide claim was admitted. On this state of facts you decided to approve the Camp Bird application, and to issue a patent thereon containing the following clause, viz:

"That the grant hereby made is restricted to the land hereinbefore described, which lies outside of the area of the intersection of the Camp Bird survey with the surface-ground of the Adelaide lode, there being excepted and excluded from this conveyance all surface-ground contained in the Adelaide location, as shown by the foregoing description, together with all veins, lodes, and ledges lying and being therein, to which the said Adelaide mining-claim is entitled by reason of its said location."

You also decided that the Adelaide owners had been admitted to the record as parties in interest, and were entitled to the right of appeal from your decision. Both parties have appealed from your decision, and have filed elaborate arguments in support of their objections.

Section 2322 of the Revised Statutes defines the possessory rights of location of mining-claims to be as follows, viz: The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the 10th day of May, 1872, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another.

The language of this section is clear and specific in defining the rights of possession which the locators of a mining-claim are entitled to enjoy, and I find nothing in the law which can be construed as limiting the right of a patentee to the enjoyment of less rights and privileges than he could lawfully claim prior to the issuance of a patent.

The only law relating to cross lodes is found in section 2336 of the Revised Statutes, and is in these words: Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Under this statute the rights of the parties are made to depend upon the fact of actual intersection of the veins and priority of location; matters which it is the peculiar province of the judicial tribunals to determine; yet in cases where mining locations cross each other, and there

is reason to believe that a contest may arise in future, the rights of neither of the parties in interest should be prejudiced prior to a judicial determination thereof by the insertion of unnecessary *habendum* or *reddendum* clauses in the patent.

In this case the Camp Bird Company has not entered, and is not asking for a patent for the surface-ground embraced in the Adelaide claim at the point of intersection of the two claims; yet its vein may extend through the ground belonging to the Adelaide and still not intersect with the Adelaide vein. In that event the right of the Camp Bird owners to pursue said vein through the ground of the Adelaide at the point of intersection of the two claims is vested by law, and ought not be limited by the patent; while on the other hand, the right of the owners of the Adelaide to pursue their vein is equally well protected by the statute, and should not be prejudiced by the grant to the Camp Bird company. Under the circumstances of the case, the only way by which the interests of both parties can be fully protected is by making the excepting clause in favor of the Adelaide company as broad as the granting clause to the Camp Bird company; for, by so doing, both will receive all that the law gives them, and neither will have any legal advantage.

It is a familiar principle of law that a reservation in a *reddendum* clause in a deed by a grantor, to be valid, must be made to one of the grantors and not to a stranger to the deed [2 Bl. Com. 299; Co. Litt. 47; Touchs 80; Cruise Dig., tit. 32, c. 24, s. 1.,] and I am, therefore, of opinion that the exception should be contained in the *habendum* clause.

The following form will, in my opinion, fully protect the interests of both parties, viz: "Have given and granted, and by these presents do give and grant, unto the said Patrick Gallagher and Charles Gallagher, and to their heirs and assigns, the said mining premises hereinbefore described as —— with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of —— linear feet of the said Camp Bird vein, lode, ledge, or deposit, for the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining, and also of all other veins, lodes, ledges, or deposits through their entire depth, the tops or apexes of which lie inside of the exterior lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the side lines of said survey: *Provided*, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits; excepting and excluding, however, all that portion of said surface-ground embraced by mineral survey No. 254 of the Adelaide mining-claim, and also excepting and excluding all veins, lodes, ledges, or deposits, the top or apex of which lie inside of the exterior lines of said Adelaide survey at the surface, extended downward vertically, or which have been therein

discovered or developed: *Provided*, That nothing contained in this grant is intended to interfere with the legal rights of said claimants in case said veins are found on exploration to intersect with each other."

Inasmuch as the owners of the Adelaide lode failed to file an adverse claim and commence suit within the period prescribed by law, I am of opinion that your ruling that they were entitled to the right of appeal, as parties in interest, was erroneous.

Your decision is modified in accordance with the views above expressed.

Under date of July 25, 1879, the Secretary issued the following additional instructions in this case:

"You are hereby instructed to insert in the form prescribed in said decision the words 'fifteen hundred' so as to make the clause read as follows; * * * 'with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, of fifteen hundred linear feet of said Camp Bird vein, lode, ledge,' etc."

NEW IDRIA MINING COMPANY.

The departmental decision of August 4, 1871, rejected the application of this company for a patent for certain quicksilver mines in Fresno county, California because:

1. Some of the necessary steps were taken in direct violation of the orders of the proper officers of the Interior Department.
2. The evidence was defective in not showing that the proper notice and diagram were posted up on the premises, and in not identifying the claims alleged in the petition or advertisement.
3. There was not sufficient proof of the citizenship of the claimants, and the amount of land exceeded that authorized by law.

On review it is held:

1. That the surveyor-general and register and receiver cannot properly be said to have disobeyed their orders, as they were ordered not to receive any application for mineral claims within the boundaries of the Panoche Grande Rancho, as it is shown that said rancho, according to the petition and decree, is located some ten miles distant from the New Idria mines.
2. The proof of posting notice and diagram is still defective. The identity of the claims is now satisfactorily shown.
3. The defect in proof of citizenship was cured by the mining act of May 10, 1872. The departmental decision was erroneous as to the quantity of land that could be entered on locations made prior to July 26, 1866. The quantity is only limited by the local mining laws and regulations in force at the date of location. The amount of 480 acres, the quantity applied for, is in excess of the quantity that could properly be located by the parties from whom the New Idria company derive title.

The departmental decision of August 4, 1871, is sustained, and the application for patent denied.

*Secretary Schurz to Commissioner Williamson, July* 26, 1879.

I have considered the application of the New Idria Mining Company of California, for a reconsideration of departmental decision of August 4, 1871, rejecting the application of said company for a patent for 480 acres of mineral land situate in Fresno county, in the State of California.

The application for patent was rejected for the following reasons:

"First. Some of the necessary steps in the case were taken in direct violation of the orders of the proper officers of the Interior Department."

"Second. The evidence is defective in not showing that the proper

notice and diagram were posted up on the premises, and in not identifying the claims alleged in the petition or advertisement."

"Third. There is not sufficient proof of the citizenship of the claimants, and the amount of land claimed exceeds that authorized by law."

The application for this review was filed in this department December 15, 1871, and was rejected by departmental decision of April 27, 1872. On June 15, 1872, however, my predecessor, Hon. C. Delano, revoked the departmental decision of April 27, 1872, and directed that the application should stand for consideration as if said decision had not been made.

The petition of said company for review requests an opportunity to be heard on the objections raised to the application for patent in the decision of August 4, 1871, and also to furnish testimony in support of the citizenship of its stockholders and officers.

No proceedings have been taken in the case since the order of my predecessor of June 15, 1872, above mentioned, looking to final action on the petition for review, until the present time, owing to the fact that the right of said company to a patent for the tract claimed has been questioned both in Congress and in the courts by William McGarrahan, who alleged that said mines were situate within the limits of the Rancho Panoche Grande, owned by him.

It having been finally determined by the Supreme Court of the United States (see United States *vs.* Gomez, 23 Howard, 326; 1 Wallace, 698; 3 Wallace, 752; 9 Wallace, 298, and McGarrahan *vs.* Mining Company, 6 Otto, 316,) that the Panoche Grande claim was fraudulent and invalid, and that Mr. McGarrahan had no right to any land thereunder, and no action having been taken by Congress looking to a further suspension of the proceedings in this case, I think the application should now be taken up and the questions involved decided. Parties who bring their cases before this department have a right to have them acted upon and determined within a reasonable time. The first objection to the application was that "some of the necessary steps in the case were taken in direct violation of the orders of the proper officer of the Interior Department." This objection refers to the action taken by the surveyor-general of California, and the register and receiver of the United States land-office at San Francisco, in causing a survey to be made of the tract claimed by the New Idria company, and in receiving the application to purchase the same, and publishing the notices required by the act of July 26, 1866. (14 Statutes, p. 251.)

Your office, by letters of April 18th and May 23, 1867, and February 1 and August 18, 1868, instructed the surveyor-general of California, and the registers and receivers in whose land-districts the Rancho Panoche Grande and New Idria mines were supposed to be, not to receive any application for mineral claims within the boundaries of said rancho.

Notwithstanding these instructions, the surveyor-general caused the mine to be surveyed, and the register and receiver of the San Francisco land-district received the application of said company to purchase the tract described in the survey, published a notice of the fact that such application had been made, and at the expiration of said publication allowed the entry and received payment therefor.

This action, in view of the instructions received, and the proceedings pending in Congress, was very improper, and should have been visited with such punishment as the department at that time had the power to inflict.

Upon such application being made, said officers should have submitted it to the department, giving their reasons, if any they had, why the same, notwithstanding the instructions received, should be allowed; and if, as it subsequently was made to appear, the mine or the tract included within the application was not within the boundaries of the Panoche Grande Rancho, that fact should have been explained. As above stated, I think it is clear beyond a reasonable doubt that said mineral claim is is not within the boundaries of the Panoche Grande Rancho, as described in the petition of Gomez to the Mexican governor for the grant, nor in the decree of the district court, which was subsequently set aside.

In Gomez' petition he says, "I pray your excellency to be pleased to concede me in property, the place known by the name of Panoche Grande, bounded on the *north* by Don Julian Ursula; on the *south* by the serrania (mountain range;) on the *east* by the Valle de los Tulares, and on the *west* by Don Francisco Arias, which tract contains three square leagues—a little more or less, as shown by the map which, in due time, I will present more correctly drawn than the one now presented."

In the decree of the district court confirming said claim, it is described as follows: "The tract of land situated in the county of Fresno, State of California, known by the name of Panoche Grande, bounded *northerly* by the lands of Don Julian Ursula; *southerly* by the hills; *easterly* by the valley of the Tulares, and *westerly* by the lands of Don Francisco Arias, containing four square leagues of land, and no more; provided that that quantity is contained within the boundaries aforesaid, and provided, also, if a less quantity is contained within the boundaries aforesaid, that confirmation of such less quantity is hereby made to said claimant; and for a more particular description of which said lands reference is hereby made to the map contained in the transcript of the case."

It will thus be seen that the boundaries of the rancho mentioned in the petition and in the decree of the court are the same, and if the grant had been finally confirmed it must have been located within the limits therein described.

The southern boundary of the lands of Don Julian Ursula, known as the "Panoche de San Juan y los Carrisolitos," formed the northern boundary of the Panoche Grande Rancho, according to the calls of the petition and decree. That rancho, having been confirmed, was located and surveyed, and a patent therefor issued July 30, 1867.

The western boundary of the Panoche Grande Rancho was the lands of Francisco Arias, called "Real de los Aguilas." This rancho was located and surveyed, and a patent issued therefor September 23, 1869.

Two of the boundaries, therefore, of the Panoche Grande Rancho, had such rancho ever existed, were definitely fixed by adjoining ranchos.

The southern boundary of said Panoche Grande Rancho was the mountains or hills. This boundary would not have been fixed further south than the chain of mountains forming the southerly boundary of the

Panoche valley, which are more than fifteen miles south of the northerly boundary of the Panoche Grande on a true line.

The Rancho Panoche de San Juan y los Carrisolitos is located in townships 11, 12, and 13 south, ranges 9 and 10 east, M. D. M.

The Rancho Real de los Aguilas is located in townships 13 and 14 south, ranges 7, 8, and 9 east.

The southern boundary of the Panoche valley is in townships 15 and 16 south. The southern boundary of said Panoche Grande, therefore, if it had been located according to the calls of the petition and decree, must have been at least ten miles north of the New Idria mine as located—said mine being located partly in township 17 south and partly in the northern part of township 18 south, range 12 east. As a matter of fact, therefore, neither of said officers, while they may be said to have committed an unwarrantable presumption in giving construction to said orders, can be properly said to have disobeyed the orders issued to them. It is true that a survey of said rancho was made under the instructions of the surveyor-general of California, in accordance with the provisions of the act of Congress, approved June 2, 1862. (12 Statutes, 410.) In said act it is provided, "but nothing in the law requiring the executive officers to survey land claimed or granted under any laws of the United States, shall be construed either to authorize such officers to pass upon the validity of the titles granted by or under such laws, or to give any greater effect to the surveys made by them than to make such surveys *prima facie* evidence of the true location of the land claimed or granted."

This survey, therefore, simply gave, if all other provisions of law in relation to surveys had been complied with, a *prima facie* location to the grant, if one had ever existed. The *prima facie* location, however, would be overturned by the fixed boundaries of the grant, as described in the petition and decree; and said survey having located the rancho a long distance from where it could have been located according to the calls of said petition and decree, it had no force or effect.

The supreme court of the State of California, in the case of McGarrahan *vs.* Maxwell *et al.*, (28 California, 75,) decided that said survey of the Panoche Grande Rancho not having been published as required by the act of 1860, was not *prima facie* evidence of the true location of said grant.

No appeal was taken from said decision by Mr. McGarrahan.

I must, therefore, conclude that the lands upon which said mineral claim is located never were within the limits described in the petition of Gomez for the Panoche Grande Rancho, and had said rancho been confirmed, it could never have been located so as to include said mines.

The testimony submitted to remove the second objection of the decision of August 4, 1871, in so far it relates to the posting of a notice and diagram upon the mine, is still defective in not showing the date on which said notice and diagram were posted on the mine, and the date on which they ceased to remain so posted.

The third section of the act of July 26, 1866, (14 Stats., 251,) provides, "that upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land-office shall publish a notice of the same in a newspaper

published nearest the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of such period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, endorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officers of five dollars per acre, together with the cost of such survey, plat and notice, and *giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days*, the register of the land-office shall transmit to the General Land Office said plat, survey, and description, and a patent shall issue for the same thereupon."

Whether the notice and diagram were posted upon the said claim during the time of the publication in the newspaper or not, is not shown by the affidavits filed.

In relation to the last clause of the second objection, it is shown that at the same time that the New Idria company applied for a patent for the New Idria mine, it also applied, or gave notice that it would apply, for patents for mines called the Victoria and Morning Star. The three notices published had reference to three distinct and separate mines. The New Idria mine embraced within its limits two mines located prior to its location, viz., the San Carlos and the Molina. At the time the application was filed, however, the San Carlos and the Molina had been purchased by the New Idria company, and their location merged in the location of said mine, all three being consolidated as one.

Some misunderstanding seems to have existed at the time the departmental decision above mentioned was made, as to these different mines, viz: whether the Morning Star and the San Carlos were one and the same, or the Victoria and the Molina were the same; this has been satisfactorily explained, and all doubt upon the question removed.

The objections contained in the last clause of the decision of August, 1871, relate to the proof of citizenship of the claimants and the amount of land included in the application.

These propositions will be considered separately.

At the time said application was filed, the company presented proof showing that it was incorporated on the 25th of July, 1858, under the general laws of the State of California, with a capital stock of $23,000, divided into 115 shares, among eleven shareholders. This was not considered sufficient proof of citizenship, and proof was required of the citizenship of each of the shareholders.

By the 7th section of the act of May 10, 1872, (17 Statutes, 91,) it is provided that "proof of citizenship under this act, or the acts of July 26, 1866, and July 9, 1870, in the case of an individual, may consist of his own affidavit thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief, and in case of a corporation, organized under the laws of the United States, or of any State or Territory of the United States, by the filing of a certified copy of their charter or certificate of incorporation." (See section 2321 of Revised Statutes.)

The rule of evidence as to citizenship prescribed in this act has been established since the decision above referred to was made, and in my opinion cures the defect therein mentioned. The application for patent in this case is for 480 acres of mineral land.

The location upon which this application is based was made by H. F. Pitt, P. Collins, and H. G. Balenger, December 13, 1854, and embraced 660 acres of land, including the San Carlos and Molina mines—the latter named mines having been purchased in by the applicant.

The location of the New Idria mine by the parties above mentioned, was made in supposed conformity with the rules and regulations of the San Carlos district, adopted December 4, 1854, which authorized a person or an association of persons to enter 160 acres of land bearing silver and quicksilver ore. Sec. 2d of the act July 26, 1866, reads as follows:

"*And be it further enacted*, That whenever any person or association of persons, claim a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvement thereon an amount not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land-office a diagram of the same, so extended, laterally or otherwise, as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

In the departmental decision above referred to, it was held in effect under the advice of Assistant Attorney-General Smith, that the quantity of land which may be entered on locations made prior to the passage of the act of 1866, was limited by the last proviso of the 4th section of said act, which reads as follows: "*And provided further*, That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons."

This, I think, was an erroneous construction of the law. In my opinion, by the 2d section of the act of July, 1866, the claims theretofore located, if in accordance with the local mining laws and regulations, were authorized to be entered, although they might include a greater quantity than three thousand feet on a lode. The condition of things which existed in the mining-district prior to the passage of any act of Congress on the subject, must be taken into consideration in construing the law. Throughout the whole mineral region adventurous persons had explored for mineral wealth; in some instances they had located valuable mines, and in order to protect those mines and their rights, they had adopted laws, rules and regulations, which were enforced by the miners with great rigor. In this condition of things the act of 1866 was passed, and the language used, in my opinion, fully justifies the conclusion that Congress intended that the locations made under the circumstances above mentioned, should stand if they conformed to the

rules and regulations of the particular mining-district in which the mine was situated. This view of the law is confirmed by the provisions of the act of May 10, 1872, (17 Stat., 91.) The question therefore arises, was this location in accordance with the rules and regulations of the San Carlos mining-district, in which the mine is situated? As above stated, the regulations of that district authorized a person, or an association of persons, to hold 160 acres of land bearing silver or quicksilver ore. The locators of this mine, Pitt, Collins, and Balenger, seem to have thought that they could take, under their local rules, a tract of land which would include as much in the aggregate as they could take separately, viz., 160 acres for each, or 480 acres in the aggregate; and in pursuance of such understanding made a location embracing 660 acres.

This location was subsequently cut down to 480 acres when a survey thereof was made, (the first survey thereof erroneously including 494.99 acres.)

The act of 1866 did not legalize locations not made in accordance with the local rules and regulations, nor did it authorize an entry of a tract included within such unauthorized location. Under the local rules and regulations, Pitt, Collins, and Balenger, as an association of persons, had the right to locate a tract of land including 160 acres, that bore the kind of ore mentioned in their local laws; they had no right to locate any greater quantity.

Their location, therefore, is voidable, at least as to the excess included therein. The New Idria company could acquire from them no greater rights than they possessed by virtue of their location, and by its purchase, therefore, did not acquire the right to have or take a patent for more than 160 acres of land. I must, therefore, agree with the departmental decision of 1871, in holding that a larger quantity of land is embraced in this application than was contemplated or authorized by law. The application for a reconsideration of Departmental decision of August 4, 1871, and the issuance of patent to said company for the tract claimed, is denied, for the reason stated.

### COLORADO CENTRAL *vs.* AMERICAN FLAG.

Annual expenditures upon lode claims are necessary to date of payment and entry; and the fact that proceedings in court under an adverse claim have been pending for four years, does not waive this requirement. A claim is not subject to relocation as abandoned ground, until the expiration of the year next succeeding that for which the annual expenditure has been made. No person out of possession can apply for patent.

*Acting Commissioner J. M. Armstrong to Register and Receiver, Central City, Colorado, August* 20, 1879.

The papers in mineral entry No. 1,074, lots 298, A and B, made in your office, September 18, 1878, by the American Flag Gold Mining Company, upon the American Flag or Bennett lode, have been examined.

On the 19th of September, 1874, two adverse claims were filed, one by the Colorado Central Gold Mining Company, and the other by James and H. C. Clark. Application for patent was suspended, and suits were commenced within thirty days by these adverse claimants, which were determined at the September, 1878, term of court, four years after their commencement, in favor of the American Flag Gold Mining Company. Certified copies of the judgment-rolls were filed in your office Septem-

ber 18, 1878, and thereupon entry of the claim and payment were allowed.

Subsequently, but on the same day, William M. Finlay filed an affidavit protesting against the issuance of patent to the American Flag Gold Mining Company, setting forth that the said company, for more than one year next preceding the 27th day of May, 1876, had failed and entirely neglected to make any improvement or do any work on said property as required by law, and left said property open to relocation and occupation; that on the 27th day of May, 1876, finding the property thus abandoned, he entered upon and took possession of said claim, relocated it, sunk a shaft more than ten feet deep, and on the 30th of May filed a copy of his relocation notice in the office of the county clerk of Gilpin county, a certified copy of which notice is made a part of his affidavit; that since the 27th day of May, 1876, he had continued in quiet possession of the claim, and had expended more than eight hundred dollars thereon for improvements and labor. He asks that the entry of the American Flag Gold Mining Company be cancelled, and a hearing ordered relative to the failure of said company to make the expenditures on the claim required by law, and to his relocation.

On the 21st of September, 1878, the company filed affidavits to show that sufficient expenditures had been made by it during the time in which abandonment is alleged, to hold its possession of the premises, and that it had held continuous possession of same. One of the affiants further testified that the alleged relocation by Finlay was made by working under the American Flag claim from a shaft sunk without its surface boundaries; and that the affiant had held a conversation with the attorney of Finlay, who had told him that Finlay's relocation was made at the instance of the Clarks, parties to one of the suits then pending in the courts against this claim.

There is no question that up to the date of publication of notice the American Flag Gold Mining Company was the rightful holder of this claim. It has maintained this successfully in the courts; but the judgment of the court necessarily related to matters precedent to the application for patent, and extended to nothing subsequent and such prior right was the only thing in issue.

The statute contemplates no interruption of the annual improvements until this entry and payment of purchase-money. No person who is *out of possession* can apply for patent, and one in possession can maintain it only in the prescribed manner. While the statute prescribes one way in which this possession must be maintained. it excludes every other.

By the statutory requirement, the first annual expenditure on this claim should have been made by January 1, 1875, and prior to that date the claim was not subject to relocation; hence, if said company made its annual expenditure by said date, the claim was not subject to relocation prior to January 1, 1876, as the company had the entire year of 1875 in which to make the next annual expenditure; and if such expenditures were made for the year ending December 31, 1875, or, if not so made, but prior to May 27, 1876, the company by its agents resumed work, the claim was not subject to the relocation of Finlay.

A hearing is hereby ordered to determine the facts.

NEVADA RESERVOIR DITCH *vs.* BLUE POINT PLACER.

A suit commenced before a court of one judicial district against a claim lying and situate within another and different district, is not within the meaning of the statute requiring the proceedings to be commenced in a court of "competent jurisdiction."

*Acting Commissioner Armstrong to Register and Receiver, Marysville, Cal., Sept.* 12, 1879.

I have examined the papers relating to the adverse claim of the Nevada Reservoir Ditch Company against the application for patent to the north half of the Blue Point Placer.

The certificate of Thos. H. Reynolds, clerk, by W. Stevenson, deputy clerk of the 19th judicial district court, dated April 14, 1879, is filed, showing that an action was commenced in said court on the 12th day of April, 1879, wherein the Nevada Reservoir Ditch Company was plaintiff, and Joseph Rogers, M. J. Crawford, and Richard Eccleson as executor and Susan J. Harvey as executrix of the last will and testament of William Harvey, deceased, defendants, to determine their right of possession to certain mining-ground in Tucker Flat mining-district, Yuba county, California.

The 19th judicial district court is in and for the city and county of San Francisco. The county of Yuba, in which the mine in question is situated, is in the 10th judicial district.

Said court in which suit was commenced is not therefore within the judicial district embracing this claim, and I find nothing in the laws of California giving this court jurisdiction in the case.

Section 2326 U. S. Revised Statutes, requires the adverse claimant "to commence proceedings in a court of competent jurisdiction," within thirty days after filing his claim. In this case such proceedings were not commenced in such court. The adverse claim is rejected.

LINCOLN LODE.

A stipulation between the applicant for patent and a party claiming adversely, that such opposing party may file an adverse claim within twenty days after the period of publication, with the same effect as if filed during such period, is void and of no effect, as the statutory period of sixty days within which an adverse claim may be filed cannot be lengthened or abridged.

*Acting Commissioner Armstrong to Register and Receiver, Leadville, Colorado, September* 19, 1879.

In the matter of the application for patent to 1,500 linear feet upon the Lincoln lode, made in your office, July 31, 1875, by the Lincoln Silver Mining Company, of Colorado, which application was suspended by you for reasons hereinafter stated.

No adverse claim was filed during the period of publication, but a stipulation—setting forth that J. H. Morrison, James McNassor, and the heirs of Sylvester Ferguson, deceased, claimed to own a portion of the land applied for by the Lincoln Silver Mining Company; that it was believed by the parties thereto that the differences existing might be harmoniously settled and suit avoided; that if it should prove that no amicable settlement could be arrived at, then the said Morrison *et al.* should be at liberty, at any time within twenty days after the period of publication should have expired, to file with the register and receiver an

adverse claim with the same effect as if filed during the period of publication, and proceedings under the application for patent should be suspended by the register and receiver until the matter could be adjudicated by the courts—was signed by the attorneys of the respective parties, and filed in the case.

Within the period of twenty days after the expiration of the period of publication, to wit, on the 22d of October, 1875, the last day of publication being the 9th day of said month, an adverse claim was filed with the register and receiver, as provided for in the above-recited stipulation; and thereupon proceedings were suspended under the application and suit was commenced 20th November, 1875.

By certified copy of court minutes it appears that this cause was, upon motion of plaintiff's attorney, continued from term to term, and on the 24th December, 1878, more than three years after commencement of action, was still pending; and it does not appear that during all this length of time any motion was made by plaintiffs for a rule on defendants to plead, or that issue was joined.

Claimants ask that said adverse claim be dismissed, for the reasons, among others—

First. That the said adverse claim was not filed during the period of publication, but was filed after such period of publication had expired.

Second. That said adverse claim has been waived by negligence of Morrison *et al.* in prosecuting the suit.

Section 2325 United States Revised Statutes prescribes that "if no adverse claim shall have been filed with the register and receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter *no objection from third parties to the issuance of a patent* shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

The succeeding section prescribes the manner in which an adverse claim shall be filed and proceedings stayed.

Where the statute is mandatory, and prescribes one way in which a thing shall be done, it cannot be done in any other way. The statutory provision being that an adverse claim must be filed within the period of publication, and declaring that if not filed within such period "no objection from third parties to the issuance of a patent shall be heard except it be shown that applicant has failed to comply with the terms of this chapter," it is mandatory upon the register and receiver and upon this office, after the expiration of such period of publication, to recognize no adverse claim and hear no objection whatever to the issuance of a patent, except to show that the applicant has not complied with the terms of said chapter.

It is not within the power of applicants for patent to extend or abridge the period of publication. If they can by stipulation change this provision of law, I know of no reason why they might not avoid any other in the same way; and to admit that a specific mandatory provision of a statute can be avoided by agreement of the parties affected by it would be absurd and work endless confusion.

Consent cannot give jurisdiction where no authority of law is given

over the subject-matter to be adjudicated. As Morrison *et al.* failed to comply with the law, by neglecting to file their adverse claim within the time prescribed by law, which they were bound to know and understand, they cannot now, even by agreement with their opponents, clothe the register and receiver with a power not granted by the statute.

Had the adverse claim been properly filed within the period of publication, the question as to whether "reasonable diligence" had been used in the prosecution of the suit filed in pursuance thereof within thirty days from said filing of the adverse claim, would have been a matter for the court to determine, and not this office. [See decision of the Hon. Secretary of the Interior, Iowa Mining Co. *vs.* The Bonanza Mining Co., June 25, 1879, on a previous page.]

STATUTE OF LIMITATION.

*Acting Commissioner Armstrong to Smith Bros., Peels Marsh, Nevada, Sept.* 20, 1879.

The fact that a party bases his right to a patent on the claim that he has held his land for a period which satisfies the statute of limitation of his State or Territory, does not avoid the necessity of publishing and posting notices of his application for patent as in other cases.

HEADLIGHT LODE.

Locations of claims must be distinctly marked on the ground; and all records of mining-claims must contain, among other things, such a description by reference to some natural object or permanent monument as will identify the claim.

Actual expenditures by the owners of a mine for which patent is sought are necessary.

The act of February 11, 1875, credits to a lode-claim the expenditures made in running a tunnel for the purpose of developing the lode owned by the proprietors of the tunnel.

All surveys of mineral claims for which patent is sought must be connected with some corner of the public surveys, or with some mineral monument or permanent natural object.

*Acting Commissioner Armstrong to Register and Receiver, Bodie, California, October* 20, 1879.

On the 4th of February, 1879, Edward Clarke, as attorney for George S. Dodge, made, in your office, mineral entry No. 69 of the Headlight lode, lot No. 38, in Lake mining district, Mono county.

On the 7th of June, 1879, the attorneys for "Vivian claimants" filed protest against issue of patent on said entry.

Ellery C. Ford, Esq., attorney for Dodge, has filed a copy of the location notice of the Vivian mine, from which it appears it was located by William A. Kermode, June 11, 1878, commencing at the southeast end line of the Headlight mine, and running in a southeasterly direction to the northwest end line of the Monte Christo mine—675 feet. The Vivian location was, therefore, made four days after the survey of the Headlight, which was made June 7, 1878. While in the Headlight the location notice names "this notice and monument," it was not described in any manner by which it could have been subsequently identified, and was, in fact, *not referred to at all in making the final survey*, which began at the southeast corner-post of the Mammoth, thus not even assum-

ing to follow the calls of the location notice of record. It then appears that the Mammoth was located with no reference whatever to any natural object or monument (so far as the record shows,) and that the Headlight was surveyed by attaching it to the Mammoth, and ignoring any attempt to identify its locus by the palpably imperfect reference to a monument, in its location notice.

I am reluctant to hold any claim void because of uncertainty of description in the original location notice, and am in no case inclined to do so where the true location can be identified, and the possession under it is shown to have been uninterruptedly in applicants and their grantors. So far as my official action on the case now in question is concerned, I am compelled to conclude that, from the record presented, neither absolute nor approximate identity of location and final survey has yet been established, which would justify me in acting favorably upon the claim, even were the case otherwise unobjectionable.

Protestants call the attention of this office to an alleged defect in proof of $500 expenditures. The proof on this point is not entirely satisfactory. It does not appear what improvements or labor, if any, have been expended upon the claim itself.

The deputy surveyor states that the then present owners of the Mammoth had commenced and were diligently prosecuting work on a tunnel about 1,000 feet north of that claim, and that the work, cost of tools, necessary outfit and transportation, have cost about $500; that two-thirds of the Headlight mine is owned by the owners of the Mammoth, and that it is designed to work both mines through the same tunnel; also, that not less than $10,000 have been expended in the purchase and transportation of machinery for the development of the two mines, etc., etc. The act of February 11, 1875, (18 Stats., 315,) undoubtedly credits to a lode-claim the expenditures made in running a tunnel for the purpose of developing the lode owned by the proprietor of the tunnel.

In this case the owners of the Mammoth commenced the tunnel. The Mammoth was owned by a corporation. The Headlight was owned by an individual. No binding agreement or contract, nor indeed any agreement whatever, between said corporation and said owner of the Headlight, whereby both parties were bound to contribute to the expenses of said tunnel, and were entitled to its use, is shown, and none is even alleged to exist. If (and it would appear to be the fact) the Mammoth Mining Company had opened a tunnel and paid the expenses thereof, to develop their mine, and it was merely *designed*, as expressed by the deputy surveyor, to work both mines through such tunnel, the expenses thereon are not to be credited to the Headlight, because, 1st, In that case the Headlight has actually made no expenditures; 2d, It is not bound to make any, and can frustrate and repudiate the *design* at any time; and, 3d, The Mammoth owners, whoever they might have been at the date of survey, may be now or in the future, could likewise *design* something different at their pleasure.

*Actual* expenditures by the owner of a mine for which patent is sought are absolutely necessary.

The affidavit aforesaid, of A. W. Rose, Jr., dated July 11, 1879, that $600 at least was actually expended in working and developing the Headlight mine prior to the incorporation of the Headlight Mining Com-

pany, contributes nothing to the point; for it is not shown *when* the Headlight Mining Company was incorporated, nor does it appear on what particular work or improvement such expenditures were made, which is essential.

The affidavit of George S. Dodge to his citizenship was made before a notary public in San Francisco, and not in the land-district in which the Headlight claim is situated. This is contrary to the requirements of sec. 2335, United States Revised Statutes, and you will be particular hereafter to decline to receive affidavits in a mining-claim where the same are not verified before an officer authorized to administer oaths within your land-district.

All surveys of mineral claims for which patent is sought must be connected with some corner of the public surveys, or with some mineral monument or permanent natural object. The connecting of one survey with another makes the accuracy of the last wholly dependent upon the perfection of the first survey.

If an error is originally made it is perpetuated, and no survey can be regarded as properly made which is so connected.

ADVERSE CLAIMS.

Where the notice of application for patent is published in a weekly newspaper, an adverse claim may be filed on or before the close of the sixty-third day of publication.

*Acting Commissioner Armstrong to Register and Receiver, Leadville, Colorado, Oct.* 29, 1879.

By decision of the Hon. Secretary of the Interior, ten (10) insertions in a weekly newspaper are essential to comply with the law requiring sixty days' publication. In such publication the tenth or last issue falls upon the sixty-third day after the first, which is excluded. The statute contemplates that adverse claims may be presented during the legal period of publication. If the legal period does not extend to and embrace the last day upon which the publication (which is held to be necessary) is made, then the insertion of said notice in the tenth consecutive issue of such weekly is not only rendered unnecessary, but would appear to be an absurd requirement.

The last or tenth insertion being essential, it follows that adverse claims may be filed until the expiration of the day upon which the last issue of such weekly publication is made.

TOWNSITE OF SILVER CLIFF *vs.* THE STATE OF COLORADO.

The provision in the act of February 28, 1861, providing for a temporary form of government for the Territory of Colorado, respecting sections 16 and 36 in each township, was a reservation—not a grant; and those sections remained the property of the United States until granted by act of March 3, 1875, providing for the admission of Colorado into the Union.

By the proviso to the said act of March 3, 1875, all mineral lands were excepted from its operation; and any section 16 and 36 known to contain minerals prior to the admission of the State is excepted from the grant.

The grant as to school sections surveyed *subsequent* to the admission of the State took effect upon the approval of the survey by the surveyor-general.

*Acting Commissioner Armstrong to Register and Receiver, Pueblo, Colorado, December* 18, 1879.

I have examined the record of proceedings and proof in the case of

the townsite of Silver Cliff *vs.* the State of Colorado, involving the right of the authorities of the town of Silver Cliff to enter, under the laws of the United States, as a townsite, certain lands in section 16, township 22 south, range 72 west, your district.

The application to make such entry by the commissioners appointed for that purpose by the board of trustees of the town was refused by you on the ground that the land involved was a school section, and inured to the State of Colorado under its grant of sections 16 and 36, for school purposes.

The declaration of the claim of the town was filed, and after due notice to the State, a hearing was had, commencing May 8, 1879, to determine the character of the land in said section 16, and whether it was known as mineral land prior to survey. Said section was surveyed from January 20 to 30, 1872, and the survey approved February 10, 1872. The report of the surveyor does not name any indications of minerals.

At said hearing all parties were present. The testimony submitted, shows beyond a reasonable doubt that the land was known as mineral as early as 1864, and that at different times between that date and 1872 various parties prospected the land, took out specimens of minerals, some of which were assayed and found to yield a good return in silver, with traces of gold. The State cross-examined the witnesses, but introduced none.

The legislation of Congress relating to sections 16 and 36 in each township in Colorado is as follows:

Section 14 of "An act to provide a temporary government for the Territory of Colorado," approved February 28, 1861, (12 Stats., 172,) provides * * * "that when the land in the said Territory shall be surveyed under the direction of (the) government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in the States hereafter to be erected out of the same."

This was a reservation, not a grant. Said sections remained the property of the United States, and while the purpose of the reservation was indicated, the power remained in the government to make any other disposition of said sections it might subsequently deem advisable.

The act entitled "An act to enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States," approved March 3, 1875, in section 7, provided, "That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not more than one-quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools."

Section 15 of the same act further provides, "That all mineral lands shall be excepted from the operation and grants of this act." (18 Stats., 474.)

Prior to said act of 1875, Congress had, by acts of July 26, 1866, and May 10, 1872, indicated its policy concerning mineral lands, and pro-

vided that they should not be disposed of except as specially provided by law.

Colorado was admitted as a State by proclamation of the President, August 1, 1876, (19 Stats., 665,) pursuant to the provisions of said act of March 3, 1875.

In the present case it is immaterial whether the land was known as mineral prior to survey or subsequent thereto, provided it was so known prior to the admission of the State into the Union, for at that date, and not sooner, said grant took effect as to non-mineral lands in said sections which had then been surveyed.

The grant, as to such sections surveyed *subsequent* to the admission of the State, took effect at date of the approval of the survey by the United States surveyor-general.

In the case now under consideration, the land was known to be mineral prior to both survey and admission of the State, and it is immaterial that the surveyor did not discover its true character.

It is also immaterial that said land was not worked and developed for its mineral until a recent period; for said act of March 3, 1875, does not provide that land which is worked for minerals shall be excepted from the grant, but "all mineral lands," whether worked or not.

The land in question is clearly not within the grant to Colorado for school purposes, but is government land, and subject to sale only under her laws.

The claim of the State is accordingly rejected. You will give due notice hereof to all parties in interest, allow sixty days for appeal, and thereafter promptly report action to this office.

Protests from claimants to mines within the town limits, against granting a patent to said town, which does not except therefrom specifically all surface-ground embraced in such claims, and alleging location prior to town occupation, have been received at this office. Should the town make entry and patent issue thereon, it will contain only the following exception: "*Provided*, That no title shall be hereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining-claim or possession, held under existing laws: *And provided further*, That the grant hereby made is held and declared to be subject to all the conditions, limitations, and restrictions contained in section 2386 of the Revised Statutes of the United States, so far as the same are applicable thereto."

In case of the townsite of Central City, Colorado, decided by this office December 23, 1875, and decision affirmed by the Hon. Secretary of the Interior, June 7, 1876, it was held that townsite entry could be made of land overlying lodes or veins, and that patent should issue for such townsite, with said reservation only. Since the date of said decision this rule and practice has uniformly and without exception been followed, and under it the owner of a mining-claim is secured in all those rights intended to be granted by the law.

MINERAL *vs.* AGRICULTURAL.

**Lands valuable for mineral are reserved from sale, except as otherwise expressly directed by law; and whether any certain lands are mineral or agricultural in character is a question of fact to be determined by proofs, it being immaterial that the lands had been borne on the official records, and sold by the district officers, as agricultural.**

**While the *right* to a patent is equivalent to a patent issued, yet the purchase of lands containing minerals under laws governing the sale of *agricultural* lands, does not vest any rights whatever in the purchaser, for mineral lands are reserved from sale; and if no right to a patent exist, a patent cannot legally issue.**

*Secretary Schurz to Commissioner Williamson, December* 22, 1879.

I have considered the case of Smith Scogin *vs.* Charles E. Culver and Lucinda Coffman, involving the mineral or non-mineral character of the W. ½ section 29, and all of section 30 town. 2 S., range 33 W., Camden, Arkansas, on appeal from your decision of June 23, 1879, holding said tracts to be mineral, except as to tracts covered by the homestead entry of Mrs. Coffman; and as to these, requiring her when she makes final proof, to notify all persons alleging such tracts to be mineral, that they may appear and establish the facts.

It appears that the tracts named are embraced in the private entry of said Culver, made April 19, 1878, and that the N. E. ¼ of section 29 is covered by the homestead entry of Mrs. Coffman, made December 11, 1872.

The plats of survey of this township, showing it to be agricultural land, were approved in January, 1845, and the land therein was offered at public sale in August of the same year. That not sold continued for sale at private entry, until the act of Congress of June 21, 1866, which required the public lands in the State of Arkansas to be sold under the homestead law only.

This act was repealed by that of June 22, 1876, and the lands in question were again offered at public sale (Proclamation No. 828) on February 4, 1878, and those remaining unsold were again offered for sale at private entry. On April 19, 1878, Culver made such entry of the lands in question (with others) by payment of cash, and received the usual receipt and certificate of purchase from the local officers. On June 12, 1878, these officers forwarded to you the sworn statement of Smith Scogin, deputy United States mineral surveyor, under date of May 15 preceding, to the effect that, in the latter part of April preceding, he was called upon to survey one or more mineral claims in said sections, which he did, and that said sections were mineral in character, and that miners had been prospecting and working the same for several months.

You thereupon ordered an investigation touching the character of said sections, and the hearing was held in the following months of July and August. The testimony shows that these sections are situate in a broken and hilly country; that they are of little or no value for agricultural purposes, and that there never have been but two agricultural settlements on them, one of which has "gone to waste," and the other, that of Mrs. Coffman, has a cultivation of eight or more acres, confined to a branch bottom.

Section 2318 Revised Statutes provides that, "In all cases lands valuable for mineral shall be reserved from sale, except as otherwise expressly directed by law."

Whether or not the lands entered by Culver were such lands is a question of fact to be determined by proofs, and it is immaterial that they had been previously borne on the official records as agricultural lands.

If, at the date of his entry, they were "valuable for minerals," they

were "reserved from sale," and the action of the local officers in allowing the entry was of no effect, because in violation of law.

The claim of the appellant that the title to these lands vested in Culver *eo instanti* upon his purchase at private entry and payment of the purchase-money, and that the same cannot be disturbed or divested by the existence of mineral in the land, subsequently brought to the knowledge of the government, cannot, I think, be maintained, under the decisions of the courts and of this Department. If reserved from sale, these lands could neither be legally entered nor patented.

In Stoddard *et al. vs.* Chambers, (2 Howard, 284,) the court, ruling that the holder of a New Madrid certificate had a right to locate it only on public land which had been authorized to be sold, say: "The inquiry here is whether the defendant has any title as against the plaintiff, and there seems to be no difficulty in answering the question that he has not. His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when the patent issued. * * * No title can be held valid which has been acquired against law. * * * It would be a most dangerous principle to hold that a patent should carry the legal title, though obtained fraudulently, or against law."

In United States *vs.* Stone, (2 Wallace, 525,) the court say: "Patents are sometimes issued unadvisedly or by mistake, where the officer has no authority in law to grant them. * * * In such cases courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it acts ministerially, and not judicially. If he issues a patent for land reserved from sale by law, such patent is void for want of authority,"

In Minter *et al. vs.* Crommeling, (18 How., 87,) the court say: "But if the executive officers had no authority to issue the patent because the land was not subject to entry and grant, then it is void, and the want of power may be proved by a defendant at law." (9 Cranch, 99.)

Although these decisions, with numerous others to the same effect, hold that a patent issued in violation of law conveys no title, and will be set aside, the principle applies even more forcibly, I think, to an entry merely, where the government retains title, and has not executed a formal instrument of conveyance; and under the same principle I held in my decision of February 16, 1878, in the case of Carron *vs.* Curtis, (Copp, April, 1878,) that, "should it be shown, however, that valuable mines have been discovered on the tract before patent issues to the agricultural claimant, no patent should issue, as such discovery would determine the mineral character of the land, but the tract should be held subject to disposal as other mineral lands."

The appellant also claims that the right to a patent is equivalent to a patent issued. This is involved in my views above expressed, because if there is no *right* to a patent, none can legally issue. Undoubtedly the courts have ruled as claimed, but their decisions are based upon the fact that the laws leading to the issue of a patent have been complied with; or, as the court say in Barney *vs.* Dolph, (7 Otto, 652,) "after the right to it is complete;" or, in Witherspoon *vs.* Drake, (4 Wall., 200,) "according to the well-known mode of proceeding at the land-office, *if the party is* entitled by law to enter the land, the receiver gives him a

certificate of entry reciting the facts by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate is executed and delivered, and thereafter the land ceases to be a part of the public domain. * * * But it is insisted that there is a difference between a cash and a donation entry; that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office, and the patent issued. * * * In neither case can the patent be withheld *if the original entry was lawful.*"

An entry made in fraud, or in violation of law, vests no right which is equivalent to a patent, any more than a patent issued under like circumstances vests a title. Nor am I able to appreciate any difference in principle as claimed by the appellant between a cash "private entry" and an entry under other laws, as respects the right to a patent, They must each comply with the requirements of law, before any right obtains, under the rule announced in the case of Witherspoon *vs.* Drake.

If, therefore, the lands embraced in the entry of Culver were in fact mineral lands, they can only be disposed of under the mineral laws, and his agricultural entry should be cancelled. That these lands were not valuable for agriculture, clearly appears from the testimony. It also shows that, although minerals have been known to exist in the locality of the lands in question for many years, and detached specimens of floating ore have been from time to time found on the surface, and mining excitements have previously occurred, no practical operations were prosecuted prior to 1878. During the early part of that year there was much prospecting, many mining locations were made, and well-defined lodes found to exist. The shaft of the "Minnesota" claim was sunk to a depth of about forty feet, and about 350 pounds of ore taken from it, which the testimony indicates to be valuable. Many other lesser shafts were sunk, and practical miners from California and Nevada testify to the mineral character of the land.

These facts tend to show that Culver made his entry with full knowledge of the mineral character of the land, and that, in fact, he made it for mineral and not for agricultural purposes.

After a full consideration of all the testimony presented in the case, I am of the opinion that the tracts in question are mineral in character, and therefore affirm your decision.

LOCATION BY A MINOR.

*Acting Commissioner Armstrong to Francis Cunningham, Visalia, California, January* 29, 1880.

The fact that the locator of a mining-claim is under the age of twenty-one years does not render the location invalid.

NUNC PRO TUNC PROCEEDINGS.

In an application for patent otherwise regular, there being no protest or adverse claim, proper proof may be substituted for certain defective papers.

*Secretary Schurz to Commissioner Williamson, February* 3, 1880.

I am in receipt of mineral entries Nos. 1 and 2, at Oxford, Idaho Territory, of Arie Pinedo, upon the Soda Springs sulphur mine. You held said entries for cancellation for the reason that the oath, under which

the application for a patent was filed, together with the affidavit of applicant that the plat and notice of intention to apply for patent remained posted on the claim during the period of publication, and the sworn statement of the fees and moneys paid in the case, were not verified before an officer authorized to administer oaths in the land-district wherein the claim is situated, but were executed and sworn to at Salt Lake City, Utah.

It appears that neither an adverse claim nor a protest has been filed in this case. It is *ex parte*, the question being one simply between the applicant and the government, and the proceedings are all regular, with the exception above noted.

The applicant now requests that he be allowed to make the affidavits above specified as defective, before the local officers at Oxford. The substitution of said affidavits would be in the nature of a *nunc pro tunc* proceeding. The other proceedings being regular, and in the absence of an adverse claim, and of a protest, I see no reason why this request should not be granted, as it will, in effect, be simply the correction of a mistake made under a directory statute in which no parties except the government and the applicant are interested, and no rights of other parties are involved.

CITIZENSHIP.

The affidavit of citizenship made by the applicant for patent must be sworn to within the land-district where the mine in question is situated.

*Acting Commissioner Armstrong to Register and Receiver, Eureka, Nevada, Feb.* 10, 1880.

The affidavit of John C. Phillips, claimant, verified at Boston, Mass., before a commissioner for the State of Nevada, is in evidence; but this does not comply with the law, which requires (sec. 2325 R. S.) that this affidavit shall be verified before a duly qualified-officer *within the land-district* where the claim is situated.

The claimant need not necessarily adopt this mode of proving his citizenship. Of itself, it is the lowest grade of evidence of the fact sought to be established; but the law makes it sufficient, and when properly verified must be accepted by this office as conclusive. It must be made by claimant himself and verified within the proper land-district. The act of January 22, 1880, does not change or relate to the proof of citizenship.

While the law permits this form of proof, it does not preclude other modes; and citizenship, like any other fact, may be established in accordance with ordinary rules of evidence, but unless verified as required by law the affidavit of claimant cannot be regarded as sufficient evidence.

TOPSEY MINE.

The act of January 22, 1880, allowing the application for a mining-patent and affidavits connected therewith to be made by an attorney or agent, applies to residents within the land-district who are temporarily absent therefrom, as well as to non-residents.

*Secretary Schurz to Commissioner Williamson, March* 2, 1880.

I am in receipt of your letter of the 8th of January, 1880, submitting the papers in the matter of mineral entry No. 457, Helena district.

Montana Territory, on appeal by William Bell Frue and Nathan S. Vestel, from your decision of October 14, 1879, holding said entry for cancellation.

The entry is of the Topsey lode, designated as lot No. 44 A, and an appurtenant mill-site designated as lot 44 B.

After an examination of the papers, your office, under date of September 10, 1879, addressed a letter to the register and receiver, pointing out the following defects in the proceedings:

1st. That the title to the mill-site appeared to be in Frue alone, and not in the applicants jointly.

2d. That the application showing compliance with the statutory requirements was sworn to by the attorney in fact of the respective applicants, and was not "under oath" of the applicants themselves.

3d. That the final affidavit as to posting of notice upon the claim was made by Frue's attorney in fact, and not by one of the claimants in person.

You directed the local officers to call upon the claimants to supply the proof required in the manner prescribed by law.

In response thereto, the applicants filed proof of joint ownership of the mill-site.

For the other proofs required, they submitted the affidavit of Vestel, one of the applicants, in which he set forth in effect that upon information and belief, the notice and plat were posted as the law required, and remained so posted continuouslyduring the entire period of sixty days of publication of notice in the new spaper; that the information upon which he relied was derived mainly from the affidavits of Walter McDermott, who made the former proof as attorney in fact of Frue and Jerry Strange, which affidavits set forth specificially the facts as to the posting of notice and plat on the claim, and of their remaining so posted continuously from July 18 to October 1, 1878; that at the time of posting of said notice both applicants were in the Eastern States, and that, therefore, it was impossible for either of them to testify from personal knowledge.

As to the sworn statement in the application, nothing farther was offered.

After the filing of these proofs, your office, October 14, 1879, held the entry for cancellation on the ground (1) that the affidavit of Vestel having been made mainly upon information and belief, was not in compliance with law, holding that the statute required this proof to be made from the applicant's personal knowledge; and (2) because the defect in the verification of the application was not cured.

From this decision the appeal was taken.

It further appears, from certain papers in the case, that Frue was a resident of Michigan, and Vestel, of Lewis and Clarke county, M. T., during the pendency of the application before the local officers; and that Frue was then in Detroit, and Vestel in New York.

Since the appeal Congress has passed an act, approved January 22, 1880, (see February *Land Owner*, p. 179,) amending section 2325 of the Revised Statutes by adding the following words: "That where the claimant for a patent is not a resident of or within the land-district wherein the vein, lode, ledge, or deposit sought to be patented is located,

the application for patent and the affidavits required to be made in this section by the claimant for such patent, may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, That this section shall apply to all applications now pending for patents to mineral lands."

If the defects in the proceedings for patent which form the basis of your decision are cured by said act, it will be unnecessary to consider and pass upon the appellant's exceptions.

In your letter of the 8th ultimo, you state as follows: "The bill to amend said section so that non-residents of the land-district embracing the claim may apply by agent, does not appear to cover this case, as the residence of one of the owners is within the Helena, Montana, land-district."

I think said act should receive a liberal construction. So far as it relates to pending applications it is clearly a remedial act, and so far as it relates to future applications it is an enlarging or beneficial act, and of the kind classed by all law writers as a subdivision of remedial statutes. It is universally held that such a statute is to be liberally construed, and that everything is to be done in advancement of the remedy that may be consistently with any construction that can be put upon it. (Potter's Dwarris, 73–4; Sedgwick, 360–1.) But if the portion of the act under consideration should be construed to limit the remedy or benefit to a non-resident, then in this case the act affords no relief, notwithstanding one of the parties is a non-resident. But it must be construed largely and beneficially, so as to suppress the mischief and advance the remedy, (Potter's Dwarris, 362; Sedgwick, 359,) and this brings us to a consideration of the mischief of the old law that was intended to be remedied by the amendment.

All affidavits under the mining act were required to be made within the land-district within which the claim lay, and certain of these affidavits were required to be made by the applicant in person. An owner of a mine residing out of the district, or one who was a resident of the district, but temporarily absent from it, desiring to make application for a patent to a mining-claim, was compelled to go or return to the district, in order to comply strictly with this requirement, it having been held that such affidavits could not be made by the owner's duly authorized agent, and where the affidavits had been made by agent, as in this case, and an entry allowed by the local officers, the entry would be cancelled.

Unless the language of the act will bear no other construction, it cannot be held that Congress intended to provide a partial remedy for the defects of the old law, or to discriminate against resident mine-owners; and the remedy is certainly not complete unless the new law will permit a mine-owner, if non-resident or not within the district to have the affidavits which the law required him to make in person made by his authorized agent, and unless it validates pending applications defective only in this, that such affidavits were made by authorized agents in cases in which applicants were unable to make them by reason of being out of the district.

"It is by no means unusual in construing a remedial statute," says Sedgwick, (p. 359,) "to extend the enacting words beyond their natural

import and effect, in order to include cases within the same mischiefs." It certainly would have been as great a hardship for Vestel, the resident owner, being then in New York, to have returned to Montana to make his affidavits within the district, as for Frue, the non-resident, being then in Detroit.

But I think it is not necessary to extend the enacting words beyond their natural import and effect in order to include the case under consideration; for while, without resorting to the rules of equitable or remedial construction, and by applying the ordinary rules of interpretation, the interpretation which you place upon the act might result, it would still, under the same rules, I think, be susceptible of another interpretation by which the case would be included. The language is, "that where the claimant for a patent is not a resident of or within the land-district," etc. Now, it is evident that an intention to limit the benefits of the act to non-residents would have been as clearly expressed as langugage can make it by omitting the words "or within," so as to read "not a resident of the land-district," or by omitting the words "of or," and reading thus, "not a resident within the land-district." So to hold that the act is limited to non-residents involves two things that should be avoided in construction if possible; first, redundancy; and, second, the impossibility of giving full force and effect to every word. Such a construction leaves the words "or within" and "of or" without force or meaning, for the intent to thus limit the operations of the section would be clear without them, but it is certainly doubtful with them.

On the other hand, the intent to extend the benefits of the act to all applicants not within the district would have been clearly expressed by leaving out the words "a resident of or," reading thus: "not within the land-district."

The same objections apply to this interpretation as to the other, but with no greater force. Either construction leads to a redundancy, and both are subject to the objection that it is not allowable to take from, or exclude, any words of a statute. What, then, was in the minds of the law-makers? Evidently, first to provide that claimants who are not residents may be allowed to have the required affidavits made by agents within the districts, "conversant with the facts sought to be established," and to relieve them from the trouble and expense of going to the districts for the purpose of making affidavits about matters, the facts of which are better known to others already there; and, second, to allow resident claimants necessarily absent from their districts to make the proofs in the same manner, and thus relieve them also from the expense, trouble, and inconvenience of returning to the district for the purpose of making the affidavits in person. In either case the proofs must be by agents conversant with the facts."

By this construction the non-resident applicant would not be compelled to make the affidavits in person in any event, while the resident applicant would be compelled to do so if within the district.

This construction seems to avoid redundancy, and gives effect to all the language of the section of the act under consideration. The idea is made reasonably clear by repeating the words "is not" between "or" and "within," thus: "That where the claimant for a patent is not a resident of or *is not* within the land-district," etc., and the sense is not de-

stroyed by omitting to repeat these words; indeed, the sentence might have been subject to criticism as tautological if the words had been repeated. And it seems to me that the use of the words which should have been omitted if the intent was to limit the act of non-resident claimants' evidences that *both* classes of claimants were intended to be provided for. But even if this were not clearly apparent from the language of the act itself, under ordinary rules of construction, then it must be admitted that the meaning is doubtful; and the rule is that remedial statutes must be liberally construed, and where the meaning is doubtful they must be construed to extend the remedy. (White *vs.* Steam Tug, etc., 6 Cal., 462; Cullerton *vs.* Mead, 22 Cal., 95; Jackson *vs.* Warren, 32 Ill., 331. See also decision of this Department, Streeter *vs.* M. K. T. R.R., *Copp's Land-Owner*, Vol. 4, page 180, where other cases are cited.)

I am of opinion that the defects on account of which you held the entry for cancellation are cured by the act of January 22, 1880, and that if the entry is otherwise regular and valid it ought to be patented.

### MINERAL MONUMENTS.

Instructions for the proper establishment of mineral monuments in regions over which the public surveys have not been extended.

*Commissioner Williamson to Surveyor-General Chandler, Boise City, Idaho, March* 27, 1880.

Too much care cannot be exercised in making mineral monuments or other reference marks used to fix the *locus* of mineral claims permanent.

Carelessness in this respect has already caused this office great inconvenience, and claimants even more.

In all cases when it is found necessary to establish a mineral monument or initial point, no reasonable or practical precaution should be neglected to render it permanent.

A tree should not be considered a permanent natural object, and it would not satisfy the requirements of this office as an initial point of a mining-claim, even when witnessed by two or more neighboring trees.

A reference of this kind would answer well enough to mark some point upon the lines of the public survey, for in this case the accuracy of the entire survey does not depend upon the reference, and the lines could at any time be re-run and the point fixed, even though the references had been obliterated.

When an initial point is taken at the confluence of two streams, the instructions should not be understood to mean the actual point of intersection of the two currents.

Neither should the water's edge at the apex of the angle formed by the intersection of two streams be taken as a starting-point, for it is well known that such a point could not, from the nature of things, be permanent, but would be continually, owing to natural causes, changing its position by the wearing away of the banks, or a change in the position of the beds of one or both of the intersecting streams.

The term *confluence of two streams* should only be used to define particularly the spot or locality upon which a mineral monument is erected. Such a monument should be placed sufficiently far away from the banks of the streams to protect it from any changes which might take place; and its position should be rendered additionally secure by

references, where such are available, to some natural and permanent objects in the vicinity.

Where two or more mineral monuments are established in the same district, they should be accurately connected with each other, either by surface measurement or by triangulation; and where practicable the initial points of adjacent mining-districts should be similarly connected.

From time to time, as occasion may require, you should furnish this office with connected diagrams of the mineral claims in all the mining-districts under your control, constructed on a scale of not less than one inch to forty chains.

When extended, the lines of the public surveys should be shown upon said diagrams.

HOW ADVERSE CLAIMS ARE AFFECTED BY RE-PUBLICATION—FEES ARE NOT REQUIRED FOR PROTESTS.

*Commissioner Williamson to Register and Receiver, Leadville, Colorado, March* 29, 1880.

When, for any reason, the publication of notice of application for patent to mineral claims is defective, and re-publication is made, the adverse claims which were filed during the first publication should be again filed within the second publication, and no fees for such second filing should be exacted. The adverse claimants should be promptly notified when the first publication is found defective and ceases, and the same papers constituting their original adverse claim, with any necessary corrections, to specify the particular proceeding to which they relate, would be sufficient.

Should the adverse claimant have commenced suit under his first filing, the certificate of the clerk of court, under seal, to that effect, furnished when the last filing of the adverse claim is made, as aforesaid, or within thirty days thereafter, will be considered as authority for the stay of proceedings contemplated in section 2326 United States Revised Statutes.

There is no legal fee for *protests* filed after the expiration of publication, or within such period. The party filing a protest, not intended to be followed by suit, or which is filed after the period of publication, is not regarded or treated as a party in interest, and is not entitled to the right of appeal—he is merely *amicus curiæ*, and seeks to suggest some failure on the part of the claimant to comply with the law, or some defect in the record, of which the government should take notice.

You should always receive such protests, but are not required to give the party filing them any time for appeal or argument. If they suggest any defect, of course you will require it to be remedied before allowing entry, in the same manner as if you had discovered the defect without the suggestion in the protest.

In all cases such protests must accompany the record to this office.

Adverse claims filed subsequent to expiration of the period of publication can be considered only as protests, and should be received as such, without fees.

No fees must be charged or received for anything but the adverse claim, filed and acted upon as such.

LOCATION ON SUNDAY.

*Commissioner Williamson to Francis Cunningham, Visalia, Cal., March* 29, 1880.

A mining-claim would not, under United States laws, be invalid merely because located on Sunday. If your State and local laws do not prohibit locations on the Sabbath, the location would be legal.

CONSTITUTION *vs.* PHŒNIX.

**As the adverse claimant satisfactorily shows the nature, boundaries, and extent of his claim, the motion of the applicant for patent to dismiss the adverse claim is overruled.**

*Commissioner Williamson to Register and Receiver, Salt Lake City, Utah, April* 15, 1880.

On October 2, S. H. Wooster made application for himself and his co-owner, C. H. Stevens, to enter the Phœnix mining-claim, lot No. 211, located by himself in 1876. The claim was surveyed on August 5, 1879, and approved September 30, 1879. During the period of publication, viz., December 1, 1879, an adverse claim was filed by the Stuart Mining Company on the Constitution lode. On the 5th of December the attorneys for Wooster filed with the register and receiver a motion to dismiss said adverse claim. On or before December 9, 1879, suit was commenced by the Constitution claimants. On December 16 the register overruled the motion to dismiss, and from this decision the applicant for the Phœnix has appealed. The error assigned is in effect that the adverse claim does not *correctly show* the nature, boundaries, and extent of the ground alleged to be in conflict therein, as is required by section 2326 Revised Statutes.

The adverse claim alleges that the Stuart Mining Company is the lawful owner, and entitled to the possession of about 700 feet in length and 200 feet in width of the alleged Phœnix lode, as shown by the diagram posted on said claim. Exhibit A is the affidavit of Clayton Harris, the secretary of the Stuart company, and recites that said company is a duly organized corporation; that it is the owner by purchase and is in the possession of the Constitution lode and mining-claim; that on the 21st of September, 1869, the premises embraced in the Constitution claim were unoccupied and unclaimed mineral lands, and on the day aforesaid, and while the land was so vacant and unclaimed, Henry B. Bustford, Thomas Sappington, and others entered upon and explored said premises and located the Constitution lode; that said location was duly recorded, and that by a chain of conveyances the contestant has succeeded to all the rights of the said locators, and that they have held and worked their claim in accordance with the laws of Congress and the district mining laws. Exhibits B and C are the location notice and abstract of title, respectively, showing title in the Stuart Mining Company; Exhibit D is the mining laws of West Mountain district; Exhibit E evidence of the incorporation of the Stuart Mining Company; and Exhibit F a duly-certified plat, sworn to by M. F. Burgess, U. S. deputy mineral surveyor, showing the relative positions of the two claims and the conflict between them; also certifying that $500 has been expended upon the claim. From these exhibits I am unable to see in what respect the adverse claim, or, more properly, the form thereof, can be considered as uncertain or defective.

The protestant has stated the facts by reason of which he claims title, and has shown the conflict claimed to exist by a duly authenticated plat made on the ground. The claimant of the Phœnix bases his motion to dismiss the adverse claim on the ground that the plat filed by the adverse claimant for the purpose of showing the conflict is platted by other and different metes, directions, and boundaries than are given it in the official and approved survey, as well as in the field-notes and descriptions of said Phœnix claim; that the area claimed by the protestants to be in conflict embraces ground not claimed by the owner of the Phœnix in his application, while other ground that he does claim and apply for is thrown out entirely, and in this protest treated as the absolute and undisputed property of the protestant; and it is by reason of such discrepancy, and the consequent failure on the part of the protestants to show the nature, boundaries, and extent of the conflict claimed to exist, that the applicant moves to dismiss the protest. He also avers that the plat put in by protestants was not made on the ground, and that it does not agree with the approved plat of survey of the Phœnix.

It is admitted that a conflict of surface-ground exists, and it is admitted that the adverse claimant has filed a plat showing the existence of *a* certain conflict. Nothing more is necessary. Such plat is designed to and *does* show what the adverse claimant claims. He *might* claim an entirely different track of ground, which if indicated on his plat would be the adverse claim contemplated by the statute. The plat, in short, is *decisive* as showing the boundaries and extent of the adverse claim. The question is not what the protestant might, but what he actually *does claim, as shown by his plat.* The question, then, that the claimant asks this office to pass upon is, "Is the survey showing the conflict a correct one?"

Argument is unnecessary to show that this office has no jurisdiction to determine such a question. The claimant claims under one survey, the adverse claimant under another; to decide, then, which of the two surveys is correct is to decide (to a certain extent) which one of the two parties in interest is entitled to the land; a question the consideration of which is vested in the courts alone. I can see no valid reason for dismissing said adverse claim.

Said appeal is therefore dismissed and your decision affirmed.

NORTH LEADVILLE *vs.* SEARL.

Where land in the vicinity of valuable mineral deposits is returned as mineral in character on the township plat, clear and positive proof of its non-mineral character can alone overcome the return of the surveyor-general.

*Secretary Schurz to Commissioner Williamson, April* 17 1880.

I have considered the case of the Townsite of North Leadville *vs.* A. D. Searl *et al.*, involving certain tracts of land in sections 23 and 24, town. 9 S., range 80 W., Leadville district, Colorado.

The only question at issue or raised by the appeal is as to the character of the land, the townsite application being resisted on the ground that the tracts are valuable for minerals.

The undisputed facts are that the tracts were returned by the surveyor-general as mineral land, and that they are in the midst of, and in close proximity to, very valuable gold placers and lode or carbonate mines producing silver.

But the testimony of witnesses who have worked or prospected the land for minerals, gold and silver, and who were introduced as expert miners, is conflicting. Some found gold in paying quantities, and unhesitatingly give it as their opinion that the land is valuable for minerals, and will pay well for mining purposes, while others failed to find such results or indications as to convince them that the tracts are valuable mineral land, and others unhesitatingly say that they have no value whatever for mining by any known process.

That the land contains valuable minerals hardly any one denies; but upon the question whether the minerals are in paying quantities, the opinions of the witnesses, based upon the results of actual prospecting and comparison of surface indications with those of the surrounding lands, which are being profitably worked, are very conflicting; and the question arises whether the evidence is sufficient to overcome the presumption of the surveyor-general's return, and that raised by the fact of the proximity of known valuable mines. I think not.

After a consideration of all the testimony and of the arguments, both written and oral, I am of opinion that the surveyor-general's return is not overcome by proof, and that the land should be held as valuable for minerals within the meaning of section 2318 of the U. S. Revised Statutes.

Your decision dismissing the application of the county judge to enter the tract as a townsite, and sustaining the surveyor-general's return, is affirmed.

### ANNUAL WORK.

Construction of the act of January 22, 1880, relative to annual labor and improvements.

*Commissioner Williamson to H. N. Copp, Washington, D. C., May* 1, 1880.

I am in receipt of your letter of 17th ultimo, referring to the question of relocating mines under the law of January 22, 1880, and asking the following questions:

"1. When does a mine located February 1, 1880, become subject to relocation?

"2. When does a mine located April 8, 1875, on which the annual work has heretofore been promptly done and improvements made, become subject to relocation; provided no work has so far been done since April 8, 1879?"

The second section of the act to which you refer is as follows: * * * "*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim; and this section shall apply to all claims located since the tenth day of May, *anno Domini* eighteen hundred and seventy-two."

It will be perceived that said law seeks to fix the calendar year as the uniform period within which the annual improvements required by R. S., section 2324, must be made, and as locations are made at different dates through the year, the first annual expenditures are made due within one year from a common date, to wit, the 1st of January next

following the location; thereafter they become due with the expiration of each calendar year.

Hence, the first annual expenditures upon a claim located February 1, 1880, become due at the expiration of one year from January 1, 1881, to wit, January 1, 1882, on which day the claim becomes subject to adverse location if the improvements are not made.

In order to apply the law to a claim located April 8, 1875, it is necessary to calculate from the date of location, as there is no other provision for its application, and it is retroactive and embraces all unpatented claims located since May 10, 1872. The first expenditures upon this location are, therefore, to be reckoned as due within one year from January 1, 1876, to wit, January 1, 1877, and *annually thereafter by the calendar year*. It follows that, if the annual expenditures were made each *calendar year*, or within the calendar year 1879, the claim is not subject to relocation, and will become so subject only upon the expiration of 1880, and a failure of expenditures for that year. If no expenditures were made in the calendar year 1879, or since, the claim is now subject to adverse location.

### LOCATIONS AND SURVEYS.

A mining location must be substantially a parallelogram.

The middle of a vein or lode must be ascertained by actual exploration and development, and cannot be assumed to be in an unexplored position.

The location must be on one vein, and but one vein can be made the basis of the location survey of a mining location.

*Commissioner Williamson to Surveyor-General Johnson, Denver, Colorado, May* 4, 1880.

Your letter of February 4, 1880, submitting tracings of two surveys, which you say appear to come directly under the ruling of this office, in the case of the Helvetia lode, lot No. 212, dated March 6, 1879, and asking for instructions with regard to approving the same, as shown by the tracings, is at hand, and has been considered.

Regarding the location of lode-claims, section 2320 of the United States Revised Statutes reads as follows: "A mining-claim located after the 10th day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface." * * * "The end lines of each claim shall be parallel to each other."

The location contemplated by the law above quoted must have been essentially a parallelogram. The wording of the law evidently presupposes such a figure, or it would not have been made to read, fifteen hundred feet in length by three hundred in width on each side of the middle of the vein at the surface. Had the complicated figures shown in your tracings been thought possible or likely to occur, the law would have been differently framed in order to meet just such contingencies; for, as I shall endeavor to show, it is only when certain peculiar conditions exist that such a location can be made to satisfy the intent of the mining act.

Locators' rights of possession and enjoyment are defined by section 2322 of the U. S. Revised Statutes to be as follows, to wit: "Locators shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

The intent of the above-quoted section of the Revised Statutes was held by the Supreme Court in its decision in the case of the Flagstaff Silver Mining Company of Utah *vs.* Helen Tarbet, [see Part IV,] to be as follows:

"That mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode and extend vertically downward, and that the right to follow the dip outside the side lines is based upon the hypothesis that the direction of those lines corresponds substantially with the course of the vein or lode at its apex on or near the surface."

"It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside his side lines; that would subvert the whole system sought to be established by the law.

"As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave greater or less width according to the dip of the vein; but our laws have endeavored to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course, to any depth below the surface, although laterally its inclination may carry it ever so far from a perpendicular."

Such a location as the one shown in survey No. 709 was evidently never contemplated by the law as above quoted, which clearly means that the claim must be contained between parallel end lines indefinitely extended; for the right of possession to the outside parts of such veins or ledges as may extend in their downward course outside the vertical side lines of the surface location, is based upon the supposition that such right of possession is limited and confined by the vertical planes drawn downward through the parallel end lines of the surface location extended indefinitely.

By referring to the diagram of survey No. 709 it will be seen that only the part designated *a*, *b*, *c*, *d* is contained between parallel end lines indefinitely extended, that portion of the claim designated *a*, *e*, *f* not being limited as prescribed by law between parallel end-lines; the claimant would be restricted, were such a location allowable, to perpendicular side lines. But it is not contemplated by the law that he shall be so restricted, and therefore a location which on its face defeats the intent of the law is necessarily illegal.

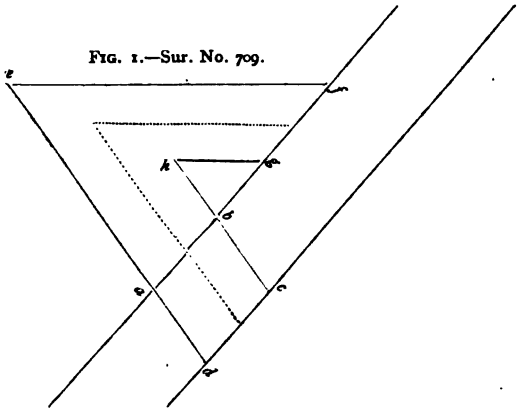


FIG. 1.—Sur. No. 709.

A location made as shown in the annexed figure, would, for the same reason, be illegal. The end-lines extended would form one and the same line; the initial planes of the end-lines would be identical—contingencies never contemplated by the law and not applicable under its conditions.

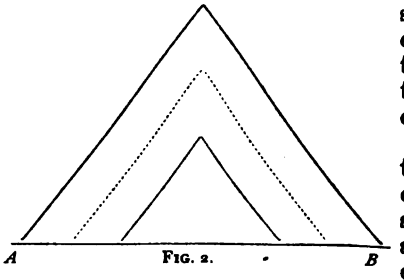



FIG. 2.

Attention is called in your letter to red lines drawn though the middle of each of the surveys, Nos. 462 and 709, marked "centre of vein," and the deputy says: "The discovery-shaft is found in the former to be about 95 feet southerly from the centre of the vein, and the centre of the vein is in the middle between the side lines of said survey, and that the red lines indicate the centre of the lode."

In the very nature of the thing a lode or vein, in its unworked and undeveloped stage, cannot be known and surveyed so as to plat it and make a diagram of it.

No developments or workings are shown upon the lines indicated in the tracings as the centre lines of the veins, although in both instances shafts are shown at a considerable distance therefrom.

Particularly is this the case with survey No. 462.

In neither case are any workings indicated or proof offered to show that the lodes or veins make the extraordinary departures from a straight course shown upon the tracings; a line is simply drawn through the centre of the claim and called the "centre of the vein."

This assumption that the middle of the vein is in an unexplored position is unwarrantable. The middle of the vein must be ascertained by actual exploration and development, or the discovery-shaft must, for executive purposes, be taken as the middle of the vein, and the lateral measurements made therefrom.

Concerning the diagrams forwarded by you, and not hereinbefore specifically explained, I may best remark that the statute contemplates a lode location to be substantially a parallelogram; and that the several calls of the statute, the grant of right, the limitation of rights, and the theory of the law all point to this conclusion.

I do not intend to be understood as construing the law as requiring a perfect parallelogram; but it must not vary largely from that figure, for such material variance involves conditions which in a greater or less degree, according to circumstances which at the date of location, and patent even, are most frequently unknown quantities, conflict with the theory of the law, render uncertain the property rights of adjoining owner or owners in the vicinity, and in a patent which should convey the property in that form which will at least render an application of the law to its subsequent use possible, result in rich and apt material for litigation.

A portion of a side line cannot properly be made an end line. Lodes and veins do not separately run in the tortuous manner represented in the diagrams of surveys Nos. 462, 709, and 212.

If the topography of the country does not permit the claimant to take under the law all he claims, yet he must abide by the law.

The law contemplates that he shall make his location on *one vein*, and while certain rights attach to other veins whose top or apex is found within his surface boundaries, yet but one vein can be made the basis of his location.

It is from the middle of that vein that his lateral measurements must be made. The surveys Nos. 462, 709, and 212 indicate the probability that they were made with the intent to embrace therein different and distinct lodes. An examination of the attached plat of the Jay lode, lot No. 169, Boulder county, Colorado, indicates the ease with which surveys, such as you submit, could include several separate and distinct veins, and as a geological proposition it is extremely improbable that the survey you forward can be defended.

I cannot authorize their approval in their present form, and before giving them your approval you will require such modification as will bring them within the proper form as above indicated.

### CONEY *vs.* MAMMOTH.

The provisions of the mining law for the adjudication of adverse claims in the courts does not contemplate that the sale of the public mineral lands shall be indefinitely postponed upon the simple filing of a complaint. The adverse claim must be prosecuted with due diligence.

*Commissioner Williamson to Register and Receiver, Central City, Colorado, July* 15, 1880.

Referring to my decision of June 26, 1880, in the matter of the adverse claim of Philip J. Lonergan *et al.*, upon the Coney lode, against the application of Henderson H. Eddy for patent to the Mammoth lode, in which I held said adverse claim to be sufficient both in form and substance, counsel for applicant have filed certificate of the clerk of court for the first judicial district of Colorado, to the fact that on the 16th day of February, 1880, said adverse claimants filed a bill of complaint in said court against said Eddy, involving the matter of the

Coney and Mammoth lodes, but that up to the second day of June last, the date of said certificate, no summons had been issued in pursuance of said complaint.

The code of Colorado provides that "the clerk shall indorse on the complaint the day, month, and year the same is filed; and at any time within one month after the filing of the same the plaintiff may have summons issued."

Section 2326 United States Revised Statutes provides: "It shall be the duty of the adverse claimant within thirty days after filing his claim to *commence* proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence, and a failure to do so shall be a waiver of his adverse claim." Upon the commencement of such proceedings, all action in the local office must be stayed until the controvery has "been settled or decided by a court of competent jurisdiction or the adverse claim waived."

The counsel now move to dismiss said adverse claim, on the ground that the adverse claimants have failed to prosecute their suit with "reasonable diligence," as required by the statute. I am of opinion that the negligence in this instance is positive; but it is also clear that the adverse claimants have not *commenced* their suit in the manner contemplated by the statute. Until a summons is issued, the court acquires no jurisdiction over the subject-matter in controversy. The law contemplates that the sale of the public lands shall not be delayed by controversies of this character for a longer period than is necessary for the proper legal adjudication of the dispute. In some States the summons may issue at any time after the filing of the complaint. In California it may issue at any time within one year.

To hold that by the simple filing of a complaint, without having summons issued, an adverse claimant may indefinitely postpone the sale of the public mineral lands, was never contemplated.

It is clear that the court in the present case cannot acquire jurisdiction of the matter at issue, except by the consent of the parties, without the filing of a new complaint, long after the expiration of the statutory period for the commencement of actions to decide the merits of adverse claims. I therefore allow the motion of the counsel, and dismiss the adverse claim of Lonergan *et al.*, on the several grounds that they have not proceeded with due diligence, and have not commenced their action in the manner contemplated by the law.

### CENTRAL PACIFIC RAILROAD COMPANY.

**Proceedings required of said company to enable it to establish the non-mineral character of lands under circular of April 27, 1880.**

*Commissioner Williamson to Register and Receiver, Sacramento, Cal., July* 27, 1880.

I am in receipt of a letter from G. W. Farr, Esq., land attorney for the Central Pacific Railroad Company at Sacramento, asking what proceedings will be required of said company to enable it to establish the character of lands in your district under the provisions of office circular dated April 27, 1880.

One of the causes which led to the revocation of the order of with-

drawal of lands as mineral was, that under existing laws and regulations, every agricultural claimant is required to give notice, by publication and posting, of his intention to offer proof in support of his entry, and it was thought that with this publicity in case of every entry, should any land be claimed which is in fact valuable for minerals, parties interested would come forward and prove the same.

Such proceeding is not required by law in case of selections by the said company, and while it is presumed that all affidavits submitted would be made by credible witnesses, yet I do not think that an opportunity for mistakes should be given, or all protection to persons claiming lands to be mineral withdrawn.

When the railroad company shall present a list of lands that they wish to select, accompanied by the usual non-mineral affidavit, you will receive the same and hold it in your office until thirty days' notice has been given by publication in a newspaper of general circulation, published nearest the land, describing the same by legal subdivision, section, township, and range, and setting forth the fact that it has been selected by the company.

During the period of publication any person may come forward and allege under oath, that the land is mineral, and at the expiration of such period you will forward to this office a correct list of such tracts as are not so alleged to be mineral in character, and proceed to order a hearing, at the expense of mineral affiants as to other tracts.

The burden of proof will be with the parties alleging the land to be mineral, as in homestead and pre-emption entries.

By complying with the foregoing it is thought that all parties will be protected in whatever rights they may have, and a well-advised conclusion reached by this office.

Whenever the said company shall apply to select certain tracts you will be governed by the foregoing.

ORIENT, OCCIDENT, AND UNION TUNNEL LODES.

A claimant, having a mining-claim which has been located and recorded according to law, has the right to have it surveyed and platted in accordance with the location by or under the direction of the surveyor-general.

The procuring of an official survey of a mining-claim is an *ex parte* proceeding, in which the claimant alone is interested, and no one except the claimant can have the right to appeal from the approval or disapproval of the survey.

*Acting Secretary Bell to Commissioner Williamson, August* 9, 1880.

I am in receipt of your letter of the 24th June, accompanied with the papers, in the matter of the protest of M. Shaughnessy against approval by the surveyor-general of Utah Territory of the surveys of the following mining-claims, to wit: The Orient, the Occident, Union Tunnel No. 1, and Union Tunnel No. 2, situate in Uintah mining district, in said Territory. The claims purport to have been located in pursuance of section 2323 of the Revised Statutes, notices of the locations of which were regularly recorded. The surveys above mentioned are of those locations. There is no charge of misconduct against the deputy who executed the surveys, nor is the correctness of his work in any way questioned. The protest is based upon the alleged fact that the surveys embrace the surface-ground of other claims of prior location, founded upon discoveries made from the surface, which claims have already been

surveyed and for which, it is alleged, applications for patents are pending.

Upon the filing of the protest in his office, the surveyor-general forwarded the same to your office, together with the field-notes and plats of the surveys and copies of the said notices of locations, and asked to be instructed in the premises. Finding the facts to be as above stated, and that the locations were correctly surveyed, your office, under date of June 11, 1880, instructed the surveyor-general to approve the said surveys; whereupon the protestant, under date of the 21st June, applied by telegram to have the surveyor-general instructed to withhold his approval, and to be allowed thirty days within which to appeal from your instructions. You report the whole matter to this Department, and recommend, in effect, that the application be denied. I fully agree with your recommendation. In the first place, a claimant having a mining-claim which has been located and recorded according to law, has the right to have it accurately surveyed and platted in accordance with the location by or under the direction of the surveyor-general; and in order that he may use such survey and plat in the proper prosecution of any right which he may have or allege to patent for such claim from the United States, he is entitled to the surveyor-general's approval of the survey, and his usual certificate showing that the same was made in accordance with the law and instructions, and that the plat is correct; provided always, that the claimant pays the expenses of the survey, (Revised Statutes, sections 2325, 2326, and 2334;) and no one, in my opinion, has the right to be heard before the surveyor-general, your office, or this Department, by protest or otherwise, in opposition to the making or the approving of such survey, or the granting of such certificate, except the party entitled to the survey. The procuring of an official survey of a mining-claim is, from its very nature, an *ex parte* proceeding, in which the claimant alone is interested. It prejudices the rights of no one, and settles or decides nothing as regards the title of the claim. When such a survey is procured, it may be used as evidence by the claimant in proceedings for patent. If there be a previous application for a patent of the same lands, such survey cannot be of any value until such prior application be rejected, because such application would withdraw the lands described from subsequent application. If such prior application be rejected, it would, however, be of value to the party making the claim. It is the kind of evidence expressly provided by law for the purpose of identifying a claim and showing its exact location and boundaries; and it is a fundamental legal principle that a party may produce competent evidence in support of an asserted right. But such a survey is not conclusive evidence, and may be objected to by an adverse claimant, and overthrown by competent testimony. By this right of objection all adverse parties in interest are fully protected, and may be heard, at the proper time, before tribunals having jurisdiction and ample authority in the premises. Until introduced in evidence for the purposes contemplated by the mining statutes, a survey of a mining-claim is not subject to objection by any one but the applicant therefor, nor until then is there any occasion for objection or protest, save by the party for whom the survey is being made. A mining location, or record of location, might, with equal pro-

priety, be objected to or protested against by parties not claiming under it. In every proceeding for patent under the mining statutes, not only does the tribunal before which the matter is pending examine and pass upon the correctness and legality of the survey, but it considers and decides the question of the legality of the location itself. Your office and this Department have undoubted authority to make and enforce all proper and needful regulations concerning the manner of making surveys of mining-claims, and exercise general supervisory powers in the premises; and may investigate cases of misconduct or insubordination on the part of deputy surveyors and surveyors-general, and enforce the production of honest and accurate surveys. And I think the enforcement of the circular instructions of your office of November 20, 1873, which I fully approve, will secure proper surveys of mines, and leave no cause for complaint by any one. From what has been said, it necessarily follows that no one, except a claimant requesting a survey of a mining-claim, has the right of appeal from a proposed or an actual approval or disapproval of a survey of such claim, or to appeal from any instructions of your office to the surveyor-general regarding such a survey.

### CHAVANNE QUARTZ MINE.

Mining locations which fail to conform to the district laws not in conflict with State or Territorial or United States laws, are illegal, and proceedings founded thereon are invalid. Because the district laws have been persistently violated by a majority of the miners of a district, is no evidence that those laws have become a dead letter—especially if a minority have complied therewith.

The surveyor-general should refuse to approve the survey of a location not made in accordance with the local laws.

A second application for land already applied for should not be received by the local officers.

*Acting Commissioner M. E. N. Howell to Register and Receiver, Sacramento, California, August* 10, 1880.

On the 29th day of August, 1878, André Chavanne filed in your office an application for patent to the Chavanne quartz mine and mill-site, situated in Washington mining district, Calaveras county. Said application embraces five distinct mining-claims besides the mill-site, three of which, to wit, the McNair, Aspinwall, and North Star, are located upon the same vein or lode, while two, the Elk and Eureka, situate immediately south of the McNair, are upon separate and distinct lodes. Due and legal notice of said application was given by publication in the *Calaveras Chronicle*, a weekly newspaper, for a period of ten weeks, commencing September 7, 1878, and ending November 9, 1878, during which time copies of said notice were posted upon each of said claims, together with plat of survey, and also in your office. On the 14th of November, 1879, you allowed the applicant to enter and pay for the land applied for, with the exception of that portion embraced in the Elk location, which you rejected for reasons which will hereafter be stated. The claimant appealed from your action in rejecting said Elk location, which appeal was transmitted by you with the papers in the case and the entry of the remainder of the land.

Before transmitting these papers you received a protest from J. B. Haggin, claimant of the Hurricane lode, which conflicts with the Elk location, in which a number of objections are urged against the legality

of the proceedings of Mr. Chavanne, all of which will be considered in their proper order.

The Elk location having been excluded by you from entry, the above-named J. B. Haggin, who had previously (August 18, 1879) made application in your office for patent to the Hurricane lode, and received the register's order for publication of notice, applied to make entry of said Hurricane claim. To this application, however, André Chavanne had filed an adverse claim, as claimant of the Elk location, and for this reason you refused Mr. Haggin's application to make entry. From this action an appeal was taken to this office, and it is urged that the adverse claim filed by Chavanne is insufficient in substance and form, the objections being stated in detail, but need not here be recited.

The United States mining laws confer upon the miners of each mining-district the right to make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession of a mining-claim, subject to certain requirements. Locations of mining-claims which fail to conform to these requirements must be treated as illegal. The laws of Washington mining district provide, among other things:

1st. That no more than one hundred feet of surface-ground on each side of the vein or lode shall be embraced in a location.

2d. A recorder shall be elected annually, who shall hold the office until his successor shall be duly qualified.

3d. That all mining locations shall be recorded by said recorder, and must be filed with him for record within thirty days after being made.

4th. No meeting (regular or special) of the miners of this district shall be legal unless assembled in pursuance of a notice signed by at least five miners, (claim-holders,) which shall state the nature of the business to be transacted.

Of the five claims embraced in Mr. Chavanne's application, not one has been located in conformity to the local rules above recited. None have been recorded with the mining recorder; three, to wit, the Aspinwall, North Star, and Elk, are six hundred feet in width; and the McNair exceeds in length the limit allowed by the United States laws. There is no record whatever of the latter location, but it is alleged to have been located some time in 1867, "by C. V. McNair for himself" and six minor children, and Harry Childers. This makes eight persons, and allowing an additional claim for discovery, they would have been entitled to locate 1,800 feet under the mining act approved July 26, 1866, which permitted two hundred feet to be taken by each locator, with two hundred feet additional for discovery. The claim applied for, however, is 2,000 feet in length. It is urged by the claimant that the local laws have become obsolete; that they were adopted in 1867, since which time no meeting of the miners has been held, and the custom has been to observe the United States laws and be governed wholly by them; that it is also the custom to record all claims with the county recorder, and not with the mining recorder.

To a certain extent the evidence shows that this is true. A great majority of the locations of mining-claims made in this district have been recorded with the county recorder, and the greater portion of such

locations exceed the width allowed by local laws. But it appears equally true that the recorder elected at the miners' meeting in 1867 has continuously from that time kept his office open for the performance of his duties, and in every year up to the present time location notices have been recorded by him, all of which, with one exception, have conformed to the local laws in regard to width of claims. Thus it appears that while many miners have regarded the local laws as in force, and have complied with their requirements, others, and among them the present claimant, have totally disregarded these laws, and paid no attention to the limitations imposed thereby. It does not follow that because a law has been persistently violated by those who owe it obedience, it thereby becomes a dead letter. No such proposition can be sustained or admitted. The laws established by the miners of a mining-district derive their force from the act of Congress which permits the adoption of such laws; and where they do not exceed the scope allowed them, and have once been recognized by the miners, they must be held to govern in all cases where the possessory right to a mining-claim is to be determined. It has been within the power of the miners of Washington mining district to alter or amend their rules at any time if a majority desired such action, by calling a meeting for that purpose; but not even a majority could presume that the rules, once adopted, were without force, leaving the minority, who entertained a contrary presumption, subject to the restrictions imposed by such rules. In short, in my opinion, the laws adopted by the miners of a mining-district must remain in force until amended or repealed by the same authority that established them, or until abolished or modified by a law of the United States, or of the State or Territory within which the mining-district is situated.

The various locations embraced in Mr. Chavanne's claim "being illegal and void, the subsequent proceedings, even if in due form, would be invalid." [Copp's Mining Decisions, p. 190.]

The survey of these claims was approved by the surveyor-general June 26, 1878. Application for patent was made on the 29th day of the following August. After the period of publication had expired, and when the plat and field-notes now before me should have been in your office, the surveyor-general, on the 15th of August, 1879, eliminated the Elk location from said plat and field-notes, for the reason that "it is found that the $500 has not been expended upon the Elk location as required by law; that the survey of the lode line has not been run in the field; that the location is not in accordance with the local laws of the mining-district." While the reasons assigned by the surveyor-general should have been sufficient to cause him to withhold his approval in the first instance, I do not understand how this survey could properly have come before him for re-examination, and I think his action in eliminating the Elk location from the survey should be treated as a nullity. Nevertheless, you should have rejected Mr. Chavanne's application for patent: 1, Because it embraces claims upon more than one lode or vein; and, 2, Because the various locations were not made in conformity to the laws of Washington mining district. The surveyor-general should have refused to approve the survey of the claim because of the latter objection.

Your action in refusing to allow entry of the Elk location is affirmed

upon the ground here stated. For the same reason you should not have permitted entry of the residue, and said entry, No. 695, is hereby held for cancellation.

I further hold that you were in error in receiving the application of J. B. Haggin for patent to the Hurricane lode, inasmuch as the same conflicts with the land embraced in Mr. Chavanne's application. Until the latter claim is finally disposed of, no application for patent to land in conflict therewith can properly be received by you. Mr. Haggin's application must be dismissed, and no entry can be allowed except upon new proceedings.

CHAVANNE QUARTZ MINE—(REVIEW.)

Where an application for patent for mining-ground, under which an entry has been allowed, has been rejected by the Commissioner of the General Land Office, an adverse application for the same ground cannot be entertained until the question of appeal to the Secretary of the Interior has been settled.

*Commissioner Williamson to Montgomery Blair, September* 27, 1880.

I have considered your request filed in this office on the 23d ultimo, for a review of decision of the Acting Commissioner, dated 10th ultimo, dismissing the application of J. B. Haggin for patent to the Hurricane lode, situate in Washington mining district, Calaveras county, California.

Said application was dismissed upon the ground that a great portion of the land applied for was included in the pending application of André Chavanne, and hence at the date of Haggin's application the same was not in market.

Chavanne's application for patent was received by the local officers and an order for publication given. Entry was refused, however, and an appeal taken to this office; but before such refusal, the register received Haggin's application, and directed notice thereof to be published. The decision of this office rejected Chavanne's application, and allowed sixty days for appeal, which have not yet elapsed. Said decision will not be operative until the time allowed for appeal has expired.

Chavanne filed an adverse claim against Haggin's application, and brought suit to determine the right to the land. It is urged that said adverse claim is insufficient—is not good upon general demurrer—and should be dismissed. It will not be necessary to consider this objection unless the former ruling, dismissing Haggin's application, shall be reversed.

The rule which forbids the reception of an application for patent to a mining-claim, which conflicts with a claim embraced in a prior pending application, is derived from that provision of the statute which prescribes the filing of adverse claims. Where the statute prescribes one way in which a thing shall be done it precludes every other. Chavanne having made application for patent to the Elk mining-claim, Haggin, as owner of a conflicting claim, had but one method open to him to protect his interest and have his right determined.

But you now urge that this office having decided that Chavanne's application was invalid and illegal, it was in reality no application at all, and hence the subsequent application of Haggin should be allowed to stand the whole object of the prohibition of a second application being to compel another claimant to institute proceedings in the local court, to test the right of possession of the first applicant; and the whole reason

of the prohibition fails where the first application is invalid, for no adverse claim need be filed against an application which is illegal and invalid upon its face.

But the statute goes further, and after limiting the time within which an adverse claim may be filed, provides that "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." Sec. 2325 U. S. R. S.

Chavanne having filed an application for patent to the land in dispute, no other claim to the same land could be asserted, except in the manner provided by the statute, and failing to take advantage of that method, Mr. Haggin was precluded from objecting to the issue of a patent, except by pointing out from the record that the applicant had failed to comply with the law. He has no right to assert any claim to the land that this office could consider.

It is my official duty to examine the records of all mining applications, to ascertain whether the claimant has complied with the law and official regulations. If it appears that the law has not been complied with in respect to some particular thing that should have been performed prior to the filing of said application, the case will be rejected; but my action is subject to review upon appeal, and until it becomes final by waiver of appeal of affirmance of the appellate authority, such application, in my opinion, remains a legal appropriation of the land applied for, to which no other claim can be asserted in any manner.

For the reason stated, I must decline to change the ruling of the Acting Commissioner, as requested.

### OLATHE PLACER.

Lode-claims within the limits of a placer-tract, for which claims patent is not sought in the placer application, are excluded from the placer-patent, though lode-claims adversely held may be excluded from the survey of such placer-claim.

*Commissioner Williamson to E. C. Ford, Washington, D. C., Sept.* 18, 1880.

On the 14th inst., you filed in this office an argument on behalf of "certain protestants against the application of J. S. Sanderson, for patent to the Olathe placer-claim," which has been considered in the examination of the papers relating to the entry of said claim, although there is nothing to indicate what particular protestants you represent.

Mr. Sanderson filed his application for patent in the land-office at Leadville on the 7th of July, 1879, describing the land as the N. E. ¼ N. E. ¼ section 24, S. ½ of S. E. ¼, and S. E. ¼ of S. W. ¼, section 13, t'w'p *nine* S. of R. 80 W., 6th prin. meridian. Due notice thereof was given by posting in the local land-office, as appears by the certificates of the register, in a "conspicuous place upon the claim, to wit, upon a pine tree, near a shaft, about the centre of the S. E. ¼ of S. E. ¼ of section 13, where it could be easily seen and examined," as appears by the affidavits of A. H. Mallory and George H. Collins, and by publication of notice from the 12th day of July to the 13th of September, 1879, as required by law.

The published notice accurately describes the land applied for as situate in California mining district, and by proper legal subdivisions, but

by manifest typographical error the impossible (in Colorado) township number *ninety* is designated instead of *nine*, as it should be. It is not alleged that any person was misled thereby, and it is almost impossible that any one could have been misled by so transparent an error.

The subdivisional description and range being correctly given, it applies alone to the land applied for in the California mining district. The claim is designated by name; reference is made to the book and page, where the location may be found of record; and the fact that the pendency of the application had a local notoriety is demonstrated by the number of protests filed before the expiration of the period of publication. The suggestion that protestants were misled appears nowhere in the sworn protests, and seems to have originated through the ingenuity of the counsel.

The claimant, and also George H. Collins, (one of the witnesses to posting on claim,) make affidavit that said notice remained posted during the entire period of publication, giving dates. R. W. Officer and T. C. McDiortt allege, on behalf of protestants, that no such notice was posted on the claim; that they had often been upon and over the land, (160 acres in extent,) and never saw any such notice. This negative affidavit cannot, upon general principles, be given weight in opposition to the positive sworn declaration of claimant's witnesses that said notice was duly posted in a particularly-described place, and so remained during the entire period prescribed by law. It is possible that other persons might be found who had "often been upon and over the land," without seeing any notice, particularly if they were disinterested persons without claims to protect.

I am of opinion that none of the objections urged against the regularity of proceedings in this case are sufficient to stay the issuance of patent, and it is clear that due notice was given in the manner prescribed by law to all parties having adverse rights of possession to protect.

Before the expiration of the period of publication a number of protestants appeared, who allege that they are owners of lode-claims which conflict wholly, or in part, with the land applied for. This office had notice of certain other lode-claims conflicting with this placer-claim by reason of proceedings had in the local land-office and regularly reported. None of the protestants who appeared prior to the expiration of the period of publication commenced suits in court as they might properly have done, and thus stayed proceedings until their alleged rights could be adjudged by the courts, but contented themselves with the position of protestants, simply relying upon this office to protect their lode-claims from patent under the proceedings of the placer application.

By claimant's voluntary action, certain lode-claims, real or alleged, were excluded from the tract applied for, and also two conflicting placer-claims, which reduced the area claimed from 160 acres to 104 and a fraction acres, and on the 23d of April, 1880, he was permitted to make entry of that amount, to wit, 104.21 acres.

Subsequent to the date of entry, additional protests were filed, alleging the existence of known lodes or veins, in view of which, on the 1st of July last, I directed the surveyor-general to have made at claimant's expense a survey of the placer-claim.

His instructions were to the effect that where lode-claims have been duly located, and an application for patent to placer-land which embraces such lode-claims is made, the plat and survey of such placer should correctly show the locus and extent of the lode-claims; that while it is true that the patent for the placer will except from its operation all lodes and veins known to exist at the date thereof, without assuming to do what would be impracticable, viz., to name and describe them; yet where, as in this case, the owners of certain lode-claims have by protest advised this office of the existence of such claims, they should be excluded by metes and bounds. His instructions were to exclude not only such lodes as were admitted to exist, but also all others duly located.

In compliance with these instructions, a survey was made and approved by the surveyor-general, designated as No. 1,095, which reduced the area of the "Olathe" claim from 160 acres, as applied for, and 104.21 acres as entered, down to 75.76 acres. The deputy who executed the survey reports that: "Upon the plat I have designated the claims called the 'First Chance,' the 'Four Per Cent,' and the 'Buckeye,' by dotted lines. These pretended lode-claims have no mineral lode deposit or rock in place, or anything entitling them to the name of lode-claim; the shafts are in wash or drift, and *I hereby certify that no known lodes exist upon the foregoing described placer other than have been excluded from within the exterior boundaries of placer*," and more to the same effect.

After the receipt of this report, several additional protests were received from parties claiming to be owners of conflicting lodes, and I am requested to have these excluded from the survey and patent also; and it is not unreasonable to suppose that if the surveyor-general be instructed to examine these alleged claims, his report will be followed by additional protests of the same character, alleging the existence of lodes located and worked, the owners of which will have at last awakened to the necessity of bringing them to the attention of this office.

Where known lodes exist within the boundaries of a placer-claim, and application for patent is made for the latter without including an application for the vein or lode-claim, such application must be construed as a conclusive declaration that the claimant has no right of possession of the vein or lode; but if a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof. Such is the language of the statute; and it follows that a patent issued for a placer-claim which contains a vein or lode, the existence of which *is* known, is not a conveyance of any lode deposit which may be included therein. And all placer-patents issued embrace a clause of reservation as follows: "That should any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

Notwithstanding the general reservation quoted, I deem it my duty before issuing patent for a placer-claim to require all vein or lode claims, the existence of which is admitted by the applicant for patent, but not

applied for by him, or is reported by the surveyor-general to be excluded by actual survey, and the placer claimant should not be permitted to pay for the area so excluded; but in the present case I have already exercised every precaution and used every means at my command to ascertain the existence of known lodes and have them excluded. The surveyor-general reports that, aside from those excluded, no known lodes exist within the boundaries of the Olathe placer-claim, and the applicant for patent, together with two disinterested persons, swear that none exist. This is not conclusive evidence that no such lodes exist, but I think it sufficient to warrant me in issuing patent, and the owners of such lodes, if any exist, will be protected by the reservation clause always inserted.

It follows that if any lodes or veins be known to exist at the date of patent to the placer-claim, the owner thereof may make application for patent thereto at the proper land-office precisely as if no patent had been issued for the placer-claim, and upon regular proceedings being had and proof furnished that said lode was known to exist as aforesaid patent will issue.

It should be borne in mind that the protestants in this instance might have filed adverse claims, and by commencing suits in court had their rights judicially determined, and the issue there raised would have involved not only the existence of the lodes, but the amount of surface-ground which the lode claimant is entitled to take as against the placer location.

For the reasons stated I think patent should issue to Mr. Sanderson for the claim as surveyed without further delay.

STATE LAW.

The act of Congress of January 22, 1880, does not annul the provision of the State law of Colorado, which requires a discovery-shaft to be sunk within a certain number of days from date of discovery.

*Commissioner Williamson to Alfred H. Hale, Ohio, Gunnison County, Colorado, September* 25, 1880.

I am in receipt of your communication dated July 23, 1880, wherein you inquire whether the act of Congress approved January 22, 1880, amendatory of the mining act, annuls the Colorado State law in regard to the same matter. That is, "Is a man compelled to sink a ten-foot shaft, or its equivalent, inside of sixty days, to secure his claim from re-location."

The Colorado statute "*governing the location*, manner of recording, amount of work necessary to hold possession of a mining-claim," is an enactment made in pursuance of the power conferred by section 2324 U. S. Revised Statutes, and is in force, except so far as it may conflict with express enactment by Congress.

One of the conditions prescribed by the State legislature "governing the location" of a mining-claim, is that the locator or discoverer "shall locate his lode by first sinking a discovery-shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice. Second, by posting at the point of discovery on the surface a plain sign or notice," etc.

Another provision is as follows: "The amount of work done, or improvements made during each year, shall be that prescribed by the mining laws of the United States."

I therefore answer your inquiry in the affirmative; the locator of a mining-claim must perform all acts required by the statute, or the local rules and regulations adopted by the miners, in the absence of statutory provisions relating to such locations.

I see no reason why the labor or expenditures necessary to comply with the law in making the location should not apply to the expenditures required by law to be made during the first year.

Under the provisions of the act of Congress approved January 22, 1880, a claim located, for instance, on the 1st day of July, 1880, and requiring an expenditure of, say, $50 to sink the necessary shaft, etc., it will not be necessary to perform the remaining fifty dollars' worth of work required to complete the prescribed annual expenditure of $100 until the 31st day of December, 1881, the year within which such annual expenditures must be completed beginning to run from the first day of January next, succeeding the date of location.

WILDMAN QUARTZ MINE.

The nature, extent, and boundaries of an adverse claim being shown, and suit having been brought thereon in a court of competent jurisdiction, the executive department is precluded from taking action until the controversy has been settled or is decided by the court.

Where adverse relocations are made prior to the application for patent, controversies as to right of possession growing out of such relocations must be adjudicated in the courts. Where the alleged abandonment occurred subsequent to publication of notice of application for patent and prior to payment and entry the executive department would be compelled to take jurisdiction.

The local laws may prescribe a greater annual expenditure than the United States law requires.

Defective proof in this case considered.

*Acting Commissioner C. W. Holcomb to Register and Receiver, Sacramento, California, October* 21, 1880.

I have examined the matter connected with the appeal of C. T. Wheeler, applicant for patent to the Wildman quartz mine, Sutter Creek mining district, Amador, California, from your refusal to permit his entry of the same.

It appears that Wheeler filed application for patent in your office to said claim, October 2, 1879.

That said application was duly published as required by law, publication commencing October 4, 1879.

That during the period of publication, to wit, on November 13, Wm. Songer and David T. Davies, alleged owners of the Davies lode, filed their adverse claim in your office, and the same being in due and legal form, stay of proceedings was ordered by you.

That on the 21st of November suit was commenced by said adverse claimants *versus* said applicant for patent, in the district court of the 11th judicial district, in the State of California, which suit is now pending.

On the 18th day of December next following, Wheeler made application at your office to make payment and entry of said "Wildman quartz mine," which application was refused by you because of said adverse claim and the suspension of proceedings thereunder.

From your said action Wheeler appealed to this office, assigning in brief as exceptions—

1. That the pretended location of Songer and Davies was not in accordance with section 2324 of the Revised Statutes, in that it was not marked on the ground so that its boundaries could be readily traced.

2. That the notice of said location omits to locate the pretended claim of Songer and Davies with reference to some actual object or permanent monument, so that it can be identified.

3. That the notice of location recites an untruth on its face, in this, "the foregoing description is taken from notice of official survey of said Wildman quartz mine, made June 18, 1875, by W. L. McKim, United States deputy surveyor, under instructions from J. R. Hardenbergh, United States surveyor-general for California, dated April 16, 1874."

That said survey by McKim was located in town. 6 N., R. 11 E., M. D. M., and connects it with the section corner common to sections 5, 6, 7, and 8 of said township; while the pretended location of said Songer and Davies fails to make any reference to the section, township, range, or meridian, and that the adoption of the field-notes of the Wildman quartz mine survey, approved by the United States surveyor-general, as the basis of a subsequent location, is not authorized by local rules, customs of miners, or the acts of Congress relating to mines.

4. That the notice of location omits to name the mining-district, county, or State, within which their pretended claim is located.

5. That there is no evidence to show that the field-notes of the official survey of the Wildman quartz mine, made June 18, 1875, under instructions from Surveyor-General Hardenbergh, include, cover, or embrace any part of the ground claimed by Songer and Davies in this pretended notice of location.

6. That the notice of location fails to show connection with the Government survey as required by section 2327 of the Revised Statutes, although a section line divides it in two parts.

7. That it fails to show that the notice of the pretended location was posted on the lode-claim, or within the boundaries of the surveys admitted to be included within said pretended location.

8. That the notice of location omits to recite the number of feet owned by Mr. Songer in the pretended location of Songer and Davies on said lode, and that the notice of location omits to designate the number of feet owned by Davies in said location.

That the location of the pretended claim of Songer and Davies does not include 1,500 feet in length on the vein or lode. That the notice of location pretends to locate $16\frac{33}{100}$ chains along the vein or lode.

That the record of location does not claim or locate the ledge or lode through the length of the surface-ground claimed in the pretended location of Songer and Davies.

That locations of lode-claims can only be made in feet.

That the notice of location omits to name the pretended claim.

That the surface-ground claimed in the pretended notice of location was on the 30th day of July, 1879, not subject to location as a mining-claim, it having been applied for as a part of the townsite of Sutter Creek, entered by the county judge as trustee for the inhabitants of said town, on the 1st day of July, 1874, and patented January 20, 1875.

That said adverse claim is defective in that they designated and named the pretended location the "Davies quartz mine," and it does not so appear in the certified copy of the record of location.

That the survey of J. W. Brown, filed with said protest, is defective in the following:

It was not authorized to be made by the United States surveyor-general for California.

It is not sworn to by the said J. W. Brown.

It was a private survey made by J. W. Brown under the direction and by the request of said Songer and Davies.

By the affidavits of said J. W. Brown it appears that said Songer and Davies expended in labor and improvements on their pretended location about $125.

That to entitle said Songer and Davies to a survey of their pretended claim, or to the right to file a protest, they should have expended on their pretended location, in labor and improvements, a sum not less than $500.

Section 2326 of the Revised Statutes requires where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived.

The adverse claim in question was presented under oath by William Songer and David T. Davies.

Said affiants allege a failure by Wheeler and his grantors of labor or improvements required by law, and that said Wildman quartz mine was therefore subject to location by any other party.

Wherefore, on the 30th day of July, 1879, the said Songer and Davies, citizens of the United States, entered upon, located, and claimed the said premises for the purpose of mining thereon, and designated and named the same the "Davies quartz mine," and occupied the same as a mining-claim.

They submit with said adverse claim, copy of their location notice, duly certified by the deputy clerk and recorder of Amador county.

Said location notice is dated Sutter Creek, California, July 30, 1879.

I regard this as correctly showing the nature of said adverse claim. The boundaries and extent thereof are indicated by field-notes of survey, made by John W. Brown, deputy mineral surveyor, November 1, 1879. The affidavit of the adverse claimants sets forth that said locators, at the time of said location, set stakes on the said lode, and at the corners of the said claim, except on the corners in Main street and Eureka street, in the town of Sutter Creek, where it was impracticable to place stakes or monuments by reason of the constant public use of said street; and placed on the stake on the lode a written notice of location, describing the claim as located.

Said affidavit further alleges that said Davies lode and claim, and the said Wildman lode and claim, are one and the same piece of land, and are bounded by the same lines, and the one includes and contains the whole of the other, and that said Songer and Davies are the owners thereof.

I therefore conclude that the nature, boundaries, and extent of said adverse claim were duly alleged as required by law.

It appears from affidavits submitted by Wheeler, that in March, 1879, Wheeler directed his agent, G. W. Bibbins, to employ men and resume work on the Wildman mine; that said work was resumed in March, 1879, and more than $26.25 expended in such labor; that work was then stopped for the reason that to successfully work the mine it required machinery, and that active operations were postponed pending negotiations for such machinery; and that since the 2d day of October, 1879, work has been resumed on the mine by men in the employment of Mr. Wheeler, and that they are now in the quiet and peaceable possession of said property.

While it would appear in the absence of any denial of facts so alleged, that the pretended location of Songer and Davies was illegal, and while their action in adopting, as their description of such location, the field-notes of the survey made by the applicants for patent in 1879, was anomalous and without precedent, yet, under existing laws, I feel compelled to recognize said adverse claim.

Its nature, boundaries, and extent having been shown, I regard it as one which precludes executive action, until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.

It has been forcibly urged by counsel for applicant before this office that the question of abandonment by a prior owner is one which is within the jurisdiction of the executive department of the government.

By section 2324 U. S. R. S., it is provided that "the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements," etc.

In the same section it is provided as one of the requirements that *not less* than certain amounts named shall be annually expended upon lode-claims. It follows that while the State, Territory, or district may make requirements of *more* than the amount named in the United States laws, it cannot make a *less* requirement control, because it would be in conflict with the laws of the United States, which name the least sum which will preclude relocation.

Further, the local laws may require expenditures to be made in a certain manner, and within certain periods not named in the United States law, and I am of the opinion that while the conditions which determine the validity of adverse relocations are largely dependent upon local laws, it is perfectly in accord with the system of the mineral laws, and was contemplated, that controversies involving the right of possession and growing out of such relocations should, where the relocations are made prior to the application for patent, be adjudicated in the courts.

I am also of the opinion that all adverse claims, from whatever source derived, should be presented in the manner prescribed by law, and during the period of publication of notice of application for patent with a single exception, to wit:

Should the abandonment occur *subsequent* to such publication and

prior to entry and payment, a case would be presented of which the executive department would be compelled to take jurisdiction, because the law under that state of facts allows the abandoned ground to be again located by any qualified person, in the same manner as if no location of the same had ever been made, and makes no provision for the determination elsewhere of any question or controversy arising out of this class of conflicting claims.

ANNUAL EXPENDITURE.

Where a mining-claim was located October 1, 1879, and the $100 worth of expenditure and labor was made after location and prior to January 1, 1880, such expenditure is not a compliance with law; it must be during the calendar year 1880, except so much as may be required under the local law.

*Commissioner Williamson to Hon. N. P. Hill, Denver, Colorado, November* 10, 1880.

The question submitted by Mr. Haynes is as follows: "If I locate a mining-claim on the 1st day of October, 1879, and complete the assessment or discovery-shaft by the 10th day of October, 1879, and proceed immediately to do $100 worth of work, *in addition* to the assessment or discovery-shaft work, and complete the said $100 worth of work by the 20th day of October, 1879, will the Department authorities recognize said $100 worth of work as the *first annual* work under the act approved January 22, 1880?"

Section 2 of act of January 22, 1880, is as follows: "That section 2324 of the Revised Statutes of the United States be amended by adding the following words: '*Provided*, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May *anno Domini* eighteen hundred and seventy-two.'"

The act of May 10, 1872, (section 2324 Revised Statutes,) provided that "on each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

Under said section 2324 said annual improvements were due within each year, commencing with the date of location.

Upon claims located prior to May 10, 1872, the first annual expenditures were due by January 1, 1875, and annually thereafter.

The purpose of the amendment of January 22, 1880, was to secure an uniform period within which the annual expenditures should be required on all locations.

In said amendatory act such period is made to "*commence* on the first day of January succeeding the date of location of such claim."

It therefore follows that a claim located October 1, 1879, requires the expenditure of $100 worth of labor or improvements thereon within the calendar year 1880, and that whatever may have been expended during the year 1879 will not answer the requirements of expenditures in 1880.

A claim located on any date subsequent to the first day of January,

1879, requires no further expenditure during the remainder of that year than is made necessary by local laws.

SEATON MINING COMPANY *vs.* DAVIS.

**Where a party applies for mining patent and gives due notice, but fails to pay the government price and make entry at the land-office for a period within which an adverse location could be made, he cannot prevent another party from making entry of the same land after due notice except by properly filing an adverse claim. In the absence of such adverse claim, the second application will be allowed to proceed as though no prior application had been made.**

*Secretary Schurz to Commissioner Williamson, Nov.* 29, 1880.

The Seaton Mining Company, Jno. W. Gashwiler, president, J. F. Lightner, secretary, was incorporated in 1865. On the 24th of June, 1871, it filed in the district office mineral application No. 184, for the Drytown quartz claim, calling for 1,298 linear feet by a lateral measurement of 150 feet on each side of the centre vein, which application was regularly published July to September, 1871, a period of ninety days. October 7, 1873, the register certified to the fact of publication, and also that no adverse claim had been filed. Nov. 3, 1874, the surveyor-general approved a survey of the claim, and certified to the correctness of the plat and the value of the improvements.

Here the record ends. No entry was made, and the application remained on file in the district land-office.

March 25, 1878, Jno. A. Davis filed with the register of Sacramento a regular application for patent for the Peerless quartz mine, alleged to have been located by him March 1, 1878, together with a plat of survey approved on the 20th of the same month. This claim covers the same ground as the Drytown quartz claim; and Davis sets up in his application the fact of abandonment on the part of the Seaton Mining Company, and the relocation by himself under section 2324 of the United States Revised Statutes.

The register asked instructions, reporting the proceedings had in the former application, and on the 1st of May, 1878, you ordered a hearing to determine the question of abandonment.

The receiver decided in favor of the Seaton company. The register, having been of the counsel for Davis, did not join in the opinion. You have affirmed the decision, and rejected the application of Davis, adding certain directions, respecting the defects to be supplied before permitting entry by the assignee of the Seaton Mining Company.

This is an application for patent originally presented under the mining act of July 26, 1866, (14 Stats., 86,) the application and publication having been made in 1871, prior to the passage of the act of May 10, 1872, although the survey was not made until September, 1874, after the passage of the latter act and its incorporation into the Revised Statutes. It will thus be seen that more than three years had elapsed between the dates of application and final survey, and that from November 3, 1874, when the survey was approved, to March 25, 1878, when Davis applied for patent, more than three additional years had passed.

The original application was not based upon any distinctive location, only a portion of the claim having been regularly located, and only acquired definiteness by conceded possession, and marking upon the earth

by the final survey, made upon verbal evidence taken by the deputy surveyor in 1874. This survey for the first time fairly delineated the claim, and fixed its contour and boundary. Up to that time it was more properly a mining possession than a located mine, and, but for the notoriety of such possession and the previous active exploration and working of the same by the Seaton Mining Company, it might have been considered as embracing several separate and distinct claims.

In 1868 the mill was burned down. In 1869 the hoisting machinery was sold, and was removed in 1871. In 1872 all the tools were removed, the workmen discharged, and the shaft has never since been opened or used.

From March, 1876, to January, 1878, one Nicholas Ventich was engaged in prospecting and working upon the ground covered by the claim, and expended several thousands of dollars thereon. Davis claims that this work was done for the sole benefit of Ventich, adversely to the Seaton Mining Company, and offers testimony to prove the fact. The company, on the other hand, attempts to show that Ventich held possesion through its agent, one Hooper, under an agreement to divide the proceeds; and although producing no direct testimony to that effect, claims that the weight of evidence goes to sustain the allegation.

Upon all claims located prior to May 10, 1872, section 2324 requires ten dollars' worth of labor or improvements in each year for each one hundred feet in length along the vein until a patent has been issued therefor; and provides that upon a failure to comply with these conditions the claim or mine shall be open to relocation in the same manner as if no location had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after the failure and before such location. This requirement began to run against the Seaton mine January 1, 1875, as prescribed by act of June 6, 1874.

Section 2325 prescribes the manner in which "a patent for any land claimed and located for valuable deposits may be obtained." It makes no exception of claims located after failure of a former claimant, nor does it prescribe any different manner of proceeding from that required upon an original location. Jurisdiction to determine the questions relating to a right to the patent is first acquired by the filing of the application. The location belongs to a prior date, and must be made under the laws, rules, and regulations relating to the initiation, marking, and recording of the claim, and under other jurisdiction than that of the United States land officers. The application must be duly advertised, and if there be adverse claims the courts must determine all questions of the right of possession. If no adverse claim is filed, the possession is deemed rightful and the right to a patent "shall be assumed."

It appears to me that there is nothing in this case to prevent Davis from proceeding regularly with his application. His location is an accomplished fact; he made it upon allegation that the Seaton company had failed in the matter specially enjoined by the statute, and it was admitted to the local mining records.

The Seaton company had completed its publication in 1871, and by very dilatory proceedings had reached the period when entry might have been made and all further liability to forfeiture excluded, in No-

vember, 1874. Payment for about nine acres of land would have secured the title, if it had at that date fully complied with the provisions of law, (Smith *et al. vs.* Van Clief *et al.*,) but no entry had been made. The application slumbered in the register's office, and the final survey also rested somewhere, the date when it was filed with the register not being disclosed by the record. The claim had not been duly prosecuted to a final decision in the General Land Office, as required by section 2328, for until entry there was nothing to come before you for adjudication or adjustment. Section 2326 required adverse claims to be prosecuted in the courts with reasonable diligence under penalty of waiver. It is proper to require the same reasonable diligence in pending applications before the district officers. A party failing in such prosecution beyond the period when a right of location might be gained through failure to work the mine cannot complain if another, setting up such failure, and having made such location, shall be permitted to proceed according to the statute to secure title under his statutory right.

I think in such a case there is manifest propriety in submitting the whole question of failure on the one hand and acquisition of right upon the other to the test of judicial examination and control. If the Seaton Mining Company has good reason to dispute the right of Davis, it has only to file its adverse claim during the period of publication, and bring suit in the proper court for its support. On the other hand, if Davis be denied the right to proceed, he is deprived of the opportunity which the law appears to provide for all claimants of located mines, to try the right of possession in court, and must rely on such voluntary evidence as he may be able to present before the register and receiver, which, as shown by the very remarkable record in this case, cannot be relied upon in every instance to assure certainty in the determination of the issue.

### $500 IMPROVEMENTS.

Roads and necessary work may be included in the estimate.

*Commissioner Williamson to Surveyor General Johnson, Denver, Col., Dec.* 14, 1880.

All improvements made upon a mining-claim, having a direct relation to the development thereof, may be taken into consideration by you as a basis for your certificate.

Any building, machinery, roadway, or other improvements, used in connection with and essential to the practical development of the surveyed claim, will enter into and form a part of the expenditures for improvements, to which you are required to certify. Necessarily, however, improvements of the character indicated must be associated with actual excavations, such as cuts, tunnels, shafts, &c., so as to clearly show that they are intended for use in connection with the claims under consideration. Deputies should make full report of the facts in each case.

### NATIONAL MINING AND EXPLORING CO.

Where a mill-site abuts on the end of a lode-claim, proof of the non-mineral character of the mill-site may be received.

*Secretary Schurz to Commissioner Williamson, December* 23, 1880.

You held for cancellation so much of the entry of the mill-site as lies

to the south and west of a line drawn from corner No. 5 to corner No. 10 of the survey thereof, for the reason that that portion of the mill-site abuts upon the end line of the survey of another lode, to wit: The McIntyre lode, lot No. 38 E. The land thus excluded by you from said entry is not contiguous to the vein or lode applied for by said company; but I understand that it is the rule of your office, in cases like the one under consideration, to reject claims for mill-sites wherein only the ordinary non-mineral proof is offered, as in this case, upon the ground that the fact of the abutment of the land claimed upon the end of a known mineral lode-claim is such evidence of the mineral character of the land as cannot be overcome by the usual non-mineral affidavits. This undoubtedly is not only a convenient, but a safe and proper rule. I do not understand, however, that such fact is held to be conclusive.

In this case the applicant for patent in the appeal insists that the excluded tract is actually non-mineral land, and that the alleged fact is capable of demonstration; and further, that the said company ought to be allowed an opportunity to submit further proof in support of its claim in that respect.

Under the circumstances of the case (see letter of U. S. Deputy Mineral Surveyor Geo. B. Foote, in the papers of the case) I think a further opportunity to present evidence upon the point at issue should be granted the applicant, and therefore direct that you issue instructions accordingly.

### LIZZIE BULLOCK MINING-CLAIMS.

**The mining survey first applied for shall have priority in all its stages in the office of the surveyor-general, including the delivery thereof, over any other survey of the same ground or any portion thereof.**

*Secretary Schurz to Commissioner Williamson, Jan.* 8, 1881.

In your report you suggest that the rule announced in the decision of August 18, 1880, in the case of the Big Flat Gold Mining Company *et al. vs.* The Big Flat Gravel Mining Company, be so modified as to allow a party who first applies for a survey of a mining-claim priority over any other applicant or a survey of the same ground, or any portion thereof, not only as to the examination by the surveyor-general of the field-work of the deputy surveyor and delivery of plat, but priority of right to apply for a patent, provided due diligence is exercised in making the application for patent.

I must decline to make any rule interfering with the lawful right of parties to prepare and present in such manner as they see fit their applications for patents for mining-claims. It would be manifestly improper to pass upon either the sufficiency or priority of applications by anticipation or upon applications not presented. The land department can only take jurisdiction when a case is presented for action.

But in view of the reasons presented by you I think it proper to so modify the rule in question as to require that the mining survey first applied for shall have priority of action in all its stages in the office of the surveyor-general, including the delivery thereof, over any other survey of the same ground or any portion thereof; and the rule in question is hereby modified accordingly.

This, in my opinion, is the full extent to which departmental authority

can properly go in the premises; and if the rule is observed in its true spirit it will doubtless meet the difficulties which you desire to prevent.

You are authorized to issue all needful instructions for its proper enforcement.

RE-LOCATION—IMPROVEMENTS.

Where a lode mining-claim has been located by several persons jointly, and thereafter the required expenditures have not been made, the claim may be re-located by one of the former claimants to the exclusion of his co-claimants.

Labor performed or improvements made by an original locator cannot be claimed by him as part of the expenditures necessary to entitle him to patent for the relocation.

*Acting Commissioner C. W. Holcomb to Max Boehmer, Leadville, Col., March* 15, 1881.

First. Can one of the locators of a mining-claim upon which the necessary amount of expenditures for a given year have not been made, relocate the same as abandoned property, in his own name, and for himself only?

Section 2324 Revised Statutes, after prescribing the value of labor to be performed, or improvements to be made annually upon each claim, in order to protect the possessory right of locators, provides that "upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made; provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

From this it will be seen that the only question to be considered in the case stated is whether one of a number of original locators, whose claim has been abandoned, would stand upon the same footing as a stranger to the first location, who, by the provision above recited, is expressly authorized to re-locate such abandoned claim.

It is clear that one of a number of locators of a certain claim can, concurrently with such joint location, locate a separate claim, independently of his co-locators; and as an abandoned claim reverts to the mass of unappropriated public lands, and becomes subject to a new appropriation, "*in the same manner as if no location of the same had ever been made*," I can see no valid objection to a new adverse location of such claim by one of the former locators.

Second. Such location being valid, can the re-locator claim the amount of money actually expended by himself for work on the original location as part of the expenditures required by law to entitle him to receive patent for the claim so re-located?

As has been stated, the right to make such re-location by one of the original locators is founded upon the forfeiture or abandonment of the claim consequent upon *his own* dereliction as well as that of his associates. He cannot, therefore, be permitted to assume the dual character of an original claimant and a re-locator. Having located the claim "in the same manner as if no location of the same had ever been made," it is not competent for him under existing law to appropriate rights whose extinguishment must have been a necessary precedent to a valid relocation. His rights are the same as those of a party who had no interest in the previous location, neither greater nor less.

TUNNEL LOCATION.

The requirements of location and notices of a proposed tunnel apply only where blind lodes are sought to be discovered.

Where a party runs a tunnel to develop a known lode, already discovered and located, notice of such intention is not required, and a tunnel location need not be made.

*Commissioner Williamson to Register and Receiver, Lake City, Colorado, May* 4, 1881.

I have examined the protest submitted by M. D. Cooper against the issuance of patent to Henry M. Hoyt *et al.*, for the Mark Twain lode and mill-site.

The record of said entry shows that the Mark Twain lode was duly located, and that the possessory title is vested in the applicants for patent. The application for patent was filed in your office April 30, 1880, due notice of which was given in the manner prescribed by law, the period of publication expiring September 4, 1880. February 3, 1881, the claimants entered and paid for the land.

Mr. Cooper alleges that during the year 1880 no work whatever was performed upon the Mark Twain lode, and that on the 22d of January, 1881, he made a re-location of the same, under the name of the Ida City lode.

Protestant further alleges that "said H. M. Hoyt *et al.* attempted to develop said Mark Twain lode by running a tunnel on the Wheel of Fortune lode, (a claim owned by Hoyt *et al.*,) a claim or lode distant from said Mark Twain lode about twelve hundred feet, and lying at right angles with the said Wheel of Fortune lode, the said H. M. Hoyt *et al.* not being owners of the lode or surface-ground intervening, * * and without giving any notice whatever of a tunnel location for the development of said mine or mines," etc.

By an act of Congress, approved February 11, 1875, it is provided that "where a person or company has or may run a tunnel for the purposes of developing a lode or lodes owned by said person or company, the money so expended in said tunnel shall be taken and considered *as expended on said lode or lodes*, whether located prior to or since the passage of said act, (May 10, 1872;) and such person or company shall not be required to perform work on the surface of said lode or lodes, in order to hold the same as required by said act."

Protestant admits that a tunnel has been commenced on the Wheel of Fortune lode and run for the development of the Mark Twain lode, and that a sufficient amount has been expended upon or in said tunnel to maintain the possessory title to said lode during the year 1880; but contends that such expenditures cannot be held to apply to said lode, because the line of said tunnel was not located and marked upon the surface of the ground by stakes; because no notice was posted at the mouth or face of such tunnel describing the purpose for which it was run; and because no copy of such notice was filed for record with the mining recorder, etc.

Inasmuch as there is nothing in the law or instructions of this office requiring these things to be done, I fail to perceive the force of the reasons assigned. Where a tunnel is run for the purpose of discovery of "blind" lodes, under the provisions of section 2323 R. S., it is proper,

and the regulations require, that due notice of such tunnel shall be given, in order that other persons may not prospect for lodes along the line of such tunnel, which by law are vested in the tunnel claimants so long as they shall prosecute the tunnel with due diligence.

But these instructions are not applicable to tunnels run in accordance with the act of February 11, 1875, for the purpose of developing lodes already discovered and located. Indeed, said instructions were promulgated long prior to the passage of said act, and there exists not the slightest reason why any notice whatever should have been given to the world as to the manner in which the claimants proposed to develop their claims, as the rights of third parties could not by any possibility be affected thereby.

Admitting all that is alleged by protestant, there appears to be no reason why patent should not issue to the applicants.

The protest is hereby dismissed.

SUTRO TUNNEL COMPANY.

The Sutro tunnel grant includes lands west of the Comstock lode; and the withdrawal therefor operates to the full extent of the grant, notwithstanding the fact that the tunnel has not been constructed west of said lode.

Locators in possession of lode-claims at the date of the Sutro grant are not required to conform to the provisions of the United States mining laws as regards performance of annual labor, but a compliance with the local laws and regulations prescribed by the legislature of the State of Nevada must be observed.

*Commissioner Williamson to Register and Receiver, Carson City, Nevada, May* 28, 1881.

This office is advised by your letter of the 14th ultimo, that you have allowed the filing of an application for patent for a mining-claim lying about two thousand feet west of the Comstock lode, and partly within the Sutro tunnel grant, if the lines of said grant were extended beyond the limits of the Comstock lode. You also state that the Sutro tunnel reached the Comstock lode about two years ago, and that while lateral drifts have since been run on said lode, no attempt has been made by the tunnel company to extend their enterprise farther west.

Upon this statement of facts you request the opinion of this office as to whether the withdrawal from sale of the lands within the grant of Adolph Sutro, his heirs, and assigns, by the act of July 25, 1866, includes lands west of the Comstock lode, within the two thousand feet limits of the extended side lines of the grant, although the tunnel should never be constructed beyond the Comstock lode—thus prohibiting the government from selling that portion of its domain.

Section 1 of the act of July 25, 1866, granted to A. Sutro, his heirs, and assigns, the right of way to construct and excavate a mining, draining, and exploring tunnel, and provides that said tunnel "shall commence at some point to be selected by the grantee herein, his heirs, or assigns, at the hills near Carson river, and within the boundaries of Lyon county, and extending from said initial point in a westerly direction, seven miles, more or less, to and beyond the Comstock lode."

Section 2 gives to the grantee, his heirs, and assigns, "the right to purchase at five dollars per acre such mineral veins and lodes within two thousand feet on each side of said tunnel as shall be cut, discovered, or developed by running and constructing the same through its entire

extent, with all the dips, spurs, and angles of such lodes, subject, however, to the provisions of this act, and to such legislation as Congress may hereafter provide: *Provided*, That the Comstock lode, with its dips, spurs, and angles is excepted from this grant, and all other lodes, with their dips, spurs, and angles, located within the said two thousand feet, and which are or may be at the passage of this act in the actual *bona fide* possession of other persons, are hereby excepted from such grant. And the lodes herein excepted, other than the Comstock lode, shall be withheld from sale by the United States."

In accordance with this provision, and upon the filing in this office, July 31, 1866, of a preliminary survey showing the initial and terminal points and direction of the proposed tunnel, the lands embraced within the exterior boundaries of the grant, as shown by the plat of said preliminary survey, were withdrawn from sale. Notice of such withdrawal was forwarded to your office by letter of August 1, 1866, together with a diagram showing the line of the tunnel to run "through the public lands from a line dividing sections 1 and 2, in township 16 N. of range 21 E., to section 23 in township 17 N. of range 20 E., M. D. M.

On July 7, 1876, instructions were issued by this office to the surveyor-general of Nevada for an official survey of the Sutro tunnel grant. Said survey was executed in the same year by Deputy Surveyor Charles T. Hoffman, and was based upon the preliminary survey referred to above. From the plat and field-notes of said official survey it appears that the northerly and southerly side lines of the grant were run about three miles beyond the Comstock lode, to the full extent of seven miles from the initial point or eastern line of the grant. The direction and position of these lines were distinctly indicated by iron monuments, placed at short intervals, and numbered from 1 to 28 on the northerly and from 1 to 33 on the southerly line. Monuments numbered 28 and 33 are, repectively, the terminal points of the northerly and southerly lines of the grant, and are distant from the initial monuments (1) 36,960 feet, or seven miles. The withdrawal from sale, therefore, made by this office in accordance with the provisions of section 2 of the granting act, embraced all lands west as well as east of the Comstock lode, within the lines of said survey.

The present length of the Sutro tunnel is about four miles, extending from its face to the Comstock lode, thus leaving about three miles yet to be constructed west of said lode. There is no provision in the act limitating the grantees to a certain period of time in which to complete their work on pain of forfeiture of the grant. Even if such a provision had been inserted it would not be within the power of the executive department of the government to enforce the forfeiture; the title of the grantees would remain unimpaired until Congress, by appropriate legislation, should declare the forfeiture, or provide for the institution of judicial proceedings for that purpose.

It is true that Congress by a clause in the second section of the act reserves to itself the right to alter or modify the provisions of said act; but until Congress sees fit to exercise this right the privileges extended by this act are not affected by the failure of the company to prosecute their undertaking.

You will, therefore, not permit the entry of so much of the claim re-

ferred to in your letter as lies within the limits of the tunnel grant. If the mine is drained, benefited, or developed by the tunnel, the usual condition for payment of royalty to the tunnel company must be inserted in the patent when issued for that portion lying without the limits of the grant. You will be governed in this, and in all similar cases arising in future, by the instructions communicated to you by letter of February 18, 1881, in the case of Moore and Morgan lode.

Another question suggested by your communication is, whether parties in the *bona fide* possession of claims within the tunnel grant at the date of the act conferring said grant will be "compelled to do their annual labor forever in order to save their claims from falling into the hands of the tunnel company, and never be allowed the right enjoyed by other citizens of procuring government patents."

Section 2 of the act of July 25, 1866, after excepting from the grant all lodes in the actual *bona fide* possession of other persons at the time of the grant, provides that "if such lodes shall be abandoned, and not worked, possessed, and held in conformity to existing mining rules or such regulations as have been or may be prescribed by the legislature of Nevada, they shall become subject to such right of purchase by the grantee herein, his heirs, or assigns."

The general mining act of July 26, 1866, as amended by the act of July 9, 1870, and the act of May 10, 1872, provides that nothing in said acts "shall be construed to repeal, impair, or in any way affect" the provisions of the Sutro tunnel grant. Hence, persons in possession of such lodes at the time of the grant need not conform to the requirements of the mining laws of the United States, as to the performance of annual labor. A compliance with the local mining rules and regulations prescribed by the legislature of Nevada, if any there be, is sufficient for the purpose of maintaining the possessory right to such lodes. If such compliance be productive of hardship, it is a hardship remediable only by legislative action, no power being vested in this office to change or modify the conditions of the grant.

### BOUNDARY LINES.

Consideration of the boundary lines of a certain survey.

*Commissioner N. C. McFarland to Surveyor-General Mason, Helena, Montana, October* 3, 1881.

In reply to your letter transmitting the appeal of George B. Foote, attorney for the claimants in the matter of your refusal to approve the survey of the Monarch of the North mining claim, I have to state that the appeal and other papers pertaining thereto have been examined. Concerning the several points of objection made by Mr. Foote in his appeal, each will be considered in the order in which it occurs.

Beginning with the first, Mr. Foote's assertion that the surveyor-general has no power or authority conferred upon him by law or his appointment to pre-suppose the point of departure of the vein from the boundaries of the location when the same is not shown by actual developments, does not appear to be sustained either by the law or the decisions of this office.

The intent of the mining act is obviously that the position of the vein shall be determined or assumed throughout its whole extent.

Section 2320 provides that the width of a claim shall not exceed three hundred feet on each side of the middle of the vein at the surface; but whether surface-ground to this extent can be taken, depends upon the local regulation, State, or Territorial law.

Section 2324 provides that "the location must be distinctly marked upon the ground, so that its boundaries can be readily traced."

It has been held by this office that, in the absence of exploration and development, the discovery-shaft must, for executive purposes, be assumed as the centre of the lode or vein. This decision, however, presupposes that the direction of the vein can be determined by the direction of the side lines, when the discovery-shaft is known.

In the present case the side lines are irregular, and furnish no means of determining the course or strike of the vein.

Your assumption, based upon the returns of survey and the report of the deputy, that the vein followed a certain direction, was perfectly proper, and, under the circumstances, wholly justified, for the position of the discovery alone is not sufficient to fix the extent of surface-ground as provided by law.

In event of objections to such an assumption, it will be your duty to refuse to approve any survey until the course of the vein is actually determined or else admitted by the claimant to lie in some stated and probable direction.

The second objection is conceded. You have no right to dictate the form a survey must take, provided the same is made within the lines of the location, with two parallel end lines or vertical planes established to define, govern, and control the direction and extent to which the vein can be followed and worked on its dip, and is, in other respects, in accordance with law and regulation. But the end lines, or the end lines produced, must intersect the lode at or within the extremities thereof as located; it is not enough that the distance between the end lines shall not exceed fifteen hundred feet.

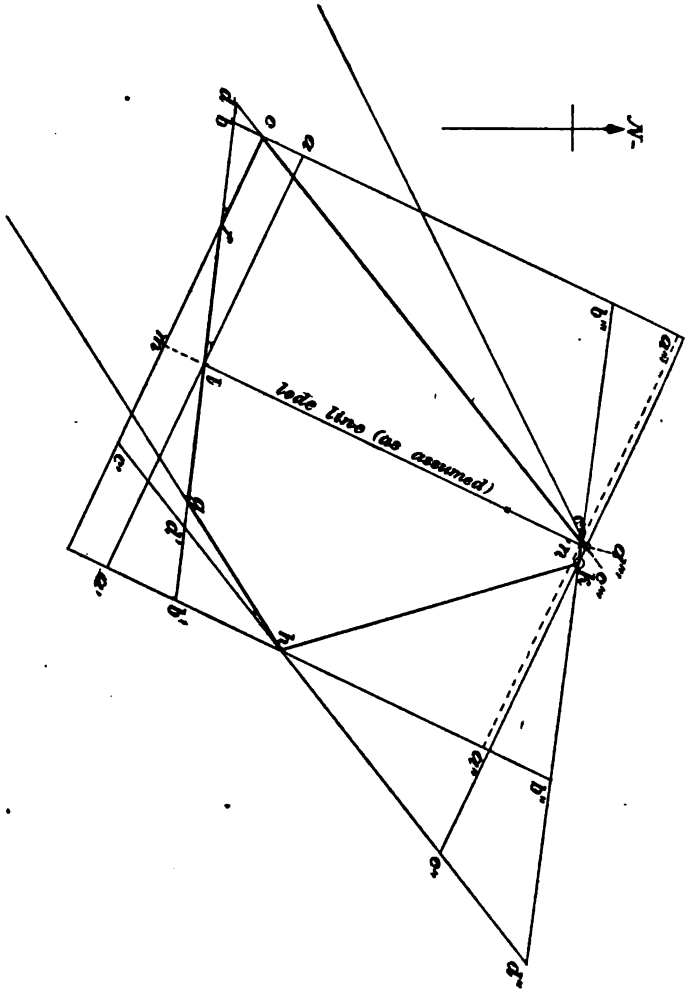
The length of the lode or vein measured between the parallel end lines should, under no circumstances, exceed the limits of the location.

Concerning the third point of objection.

You would be perfectly right in requiring the abandonment of any surface-ground lying beyond the end of the lode, or, more accurately speaking, beyond a line drawn through one extremity of the lode, parallel to the end line through the other extremity, but not, as you have it, "beyond" a line drawn through the end of the lode at right angles to its general direction. Such a requirement would involve a number of inconsistencies, and is probably not exactly what you wished to express. You have no right whatever to require that an end line shall make a right angle, or any other angle, with the general direction of the vein. It is the claimant's privilege to assume his end lines to lie in any direction whatever; the law simply requires them to be parallel. Your ruling to the contrary is therefore erroneous.

You should invariably require, however, that the extremities of the lode shall be fixed and bounded by the end lines, and not by a side line and an end line, as was the case with this survey as returned. For instance, the end lines of Monarch of the North survey were made parallel

by abandoning a small portion of the location, as *d c f*, (see diagram.) and assuming *e f*, parallel to *e′ k′* as end line.




Now section 2322 R. S. gives a locator the exclusive right of possession and enjoyment of all veins throughout their entire depth, the top or apex of which lies within his surface lines, and provides for the prosecution of the vein beyond the side lines indefinitely, limited only by the vertical planes drawn downward through the parallel end lines of the location, so continued in their own direction that such planes will intersect such exterior parts of such veins or lodes.

Evidently the intent of the foregoing is that the end lines or their extensions shall cut the lode at its extremities as located, and that the

claimant is entitled to all of the lode contained between the end lines thus established.

To demonstrate, as an end line, *c f* does not fulfill the intent of the law, for its extension will embrace an excess, *l m*, of the lode, not included in the location, and the lode is bounded by the side line *f g*, instead of the end line, at the point where it passes without the located limits.

You were right in requiring an amendment of this survey; it was also proper for you to point out how such an amendment might be made; but you were wrong in exacting obedience to your suggestion, when a satisfactory one in lieu thereof is offered by the claimant, which he prefers.

The amendment suggested by Mr. Foote that *f g* be assumed as one end line, and a line through *k*, as *d k*, parallel to *f g*, be taken as the other, was wholly proper, and is apparently the best solution of the difficulty which could under the circumstances be admitted.

By it the claimant can embrace in his survey all of the original location, except the small triangle *d k e*, which the said amendment would cut off.

All requirements would be fulfilled, for it would result in a survey essentially of the form indicated upon the diagram by *b*, *b'*, *b''*, *b'''*.

The fifth objection is conceded, for it has been decided over and over again, that the surveyor-general has no jurisdiction whatever in the matter of conflicts; he has only to survey claims in accordance with the law and regulations, and within or according to the limits located.

The fact of the discovery-shaft being within the limits of a prior location is a matter relating to the question of title; with this you have nothing to do; interested parties must protect their rights by filing an adverse claim, as provided by law.

Unless a claimant fails to show compliance with the provisions of section 2324 R. S., with regard to marking the claim upon the ground and recording it, you should not decline to issue an order for an official survey. Even if it should ultimately prove that the data in the record of location is insufficient to properly identify the claim, that is a matter to be presented in the returns of survey and the report of the deputy.

It cannot always be determined from the record whether there has been a compliance with the law or not. It is a comparatively easy matter to mark a claim upon the ground in a manner sufficient to insure its identification beyond the shadow of a doubt, but it is another matter to insure an equally accurate description in the notice and record, by reason of the absence or remoteness of well-known objects as points of reference, also by reason of obstacles manifestly in the way of an illiterate and uneducated man, such as a prospecting miner is very likely to be.

You should therefore exercise with great caution any authority which you may have in deciding upon the face of the papers whether a claim is capable of identification in the manner prescribed; for after all your order is only required to give an official status to a given survey—whether the applicant's claim is good or bad, for any reason, will appear in due time when that order has been executed.

I see no reason why an applicant should not be granted an order for a survey upon a new application without any showing whatever, save

that he has a claim, provided he pays for the same. He is entitled to your approval, however, only in accordance with instructions.

I have to concede the impropriety urged in the sixth point of objection, with regard to giving reasons not before assigned, as grounds for your disapproval, after the claimant had signified his intention to appeal from your decision. Even though such additional reasons were introduced for the purpose of getting an expression of opinion from this office upon certain points involved, your action was improper; a more direct appeal for information should, under the circumstances, have been made. I do not think, however, that such action is in any way indicative of vindictiveness, as alleged, and the evidence furnished by the papers in the case upon this point does not entitle the charge of Mr. Foote to any further consideration.

With regard to the seventh objection.

While having to admit the force of the assertion that the surveyor-general has no right, direct or indirect, to appear as attorney for or against a claimant, it must at the same time be held that there is nothing in the case which justifies the allegation that you have so acted. The correspondence only shows that you have endeavored to sustain and justify your action—nothing more.

As the survey returned was manifestly erroneous, as hereinbefore described, it will be unnecessary to consider the eighth point of objection.

Lastly, the law provides that an official survey must be made by or under the direction of the surveyor-general; but this provision does not give you the right, in event of an erroneous survey, to order an amendment or a re-survey without first consulting the wishes of the applicant for survey.

As the claimant is responsible to the deputy for the expenses of field-work, he has manifestly the right to say whether those expenses shall be increased or not. Your duty under the circumstances was either to approve or disapprove the survey as returned; in case of disapproval to give your reasons therefore, pointing out the character of the correction required, leaving it to the claimant to ask that said correction be made.

In case of error by a deputy, you should require him at his own expense to correct, for it is very proper that you should take any measures you may deem necessary, to protect a claimant from carelessness or indifference of a deputy; but to order a re-survey without the consent and approval of the claimant, making him responsible for the payment thereof, is unwarrantable, and your action in this respect must be considered as erroneous and rather summary.

### PRIVATE GRANTS.

Mineral lands within the limits of unconfirmed Spanish or Mexican grants in Arizona, reported to Congress for action, are reserved from sale and from exploration and location by mineral claimants.

*Commissioner McFarland to J. H. Mandeville, Washington, D. C., October* 6, 1881.

You inquire whether the U. S. surveyor-general for Arizona will be authorized to order a survey of a mining-claim located within the boundaries of an unconfirmed Mexican grant, which grant has been reported to Congress for action.

In reply you are advised that the act of Congress, approved July 22, 1854, entitled "An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes," provides by the 8th section thereof (10 Stat., 309) that it shall be the duty of the surveyor-general for New Mexico to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; to make a full report upon such claims, and that such report "shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico."

The act further provides, "and, until the final action of Congress on such claims, all lands covered thereby *shall be reserved from sale or other disposal by the government.*"

Section 2319 U. S. Revised Statutes provides: "All valuable mineral deposits *belonging to the United States* * * * are hereby declared to be free and open to exploration and purchase."

The treaty of Guadalupe Hidalgo with Mexico recognizes the title vested in private persons by valid Spanish and Mexican grants, and the act just quoted is intended to prevent the granting of adverse titles by the land department.

It has always been the policy of this office to treat lands in this condition as reserved not only from sale, but from exploration and location by mineral claimants.

It is therefore unnecessary to enter into detail in answer to your further suggestions.

The surveyor-general would be correct in refusing to order a survey under the conditions stated.

### GYPSUM AND LIMESTONE.

These substances are held to be minerals.

Whatever is recognized as mineral by the standard authorities, where the same occurs in quantity and quality to render the land in question more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws.

*Secretary S. J. Kirkwood to Commissioner McFarland, Oct.* 8, 1881.

I have considered the appeal of Wm. H. Hooper and others from your decision of January 25, 1881, in the matter of mineral entry No. 433, upon the Juab gypsum placer, Salt Lake City Utah, wherein you held their entry for cancellation, because lands containing deposits of gypsum are not subject to disposal under the mining laws.

Section 2318 Revised Statutes provides that "in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."

Section 2319 provides that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, * * * under regulations prescribed by law."

Section 2320 provides that "mining-claims upon veins or lodes of

quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, * * * shall be governed * * * by the customs, regulations, and laws in force at the date of their location."

Under all authorities gypsum is a mineral, but your decision holds that it is of a similar formation to limestone, and that section 2318 only embraces such lands as contain metals or other substances which give the land greater special value than that of land containing limestone in any of its forms. Your office has, however, held (Copp, August, 1875,) in the case of Rolfe, that public lands more valuable on account of deposits of limestone and marble than for agriculture, may be patented under the mining laws; and in its circular of July 15, 1873, it held "that whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of May 10, 1872," and as being "a valuable mineral deposit," I concur in these views.

The proceedings of the appellants appear to be regular, and there is no adverse claimant. They allege that the tract embraces a deposit of almost pure gypsum, and is not a mere limestone bed; and that they use the same as an article of commerce, and not for agriculture. I find, however, no proof as to the comparative value of the land for mineral or agricultural purposes.

I therefore direct that you cause an investigation to be made in this respect. Should it be found that it has greater value for the former than for the latter purpose, a patent should issue as applied for.

Your decision is modified accordingly.

### MILITARY RESERVATIONS.

**Mineral lands may be included in reservations for military purposes, and they are not subject to appropriation by mineral claimants while such reservation exists. But where mining-claims were legally located and held prior to such reservation, the miners' rights cannot be divested by taking the land for military purposes.**

*Attorney-General Wayne McVeagh to Secretary of War Robert T. Lincoln, Oct.* 21, 1881.

It appears that the military reservation of Fort Maginnis in Montana Territory was set apart by an executive order dated the 8th of April last; that certain miners of Parker, Meagher county, Montana, now allege that mineral was discovered and a mining camp established by them on land included in the reservation several months previous to the location of the post by the military authorities; and that inquiry is made by them whether they can "hold the mines and the surface-ground connected therewith, though they be on the reservation," and whether mineral land can "be located and patented on a military reservation after the establishment of the reservation."

Agreeably to a suggestion of the Secretary of the Interior contained in his letter of the 16th of August, 1881, (one of the enclosures above mentioned,) you request an opinion upon the following questions:

"1. Whether or not mineral lands reserved from sale under section 2318 Rev. Stat. of the United States can be reserved for military purposes by order of the President?

"2. Where mineral lands are included within the limits of a military reservation are such lands open to exploration and purchase under section 2319 Rev. Stat.?

"3. Where an inchoate title to mineral lands has been acquired, as shown in the letter of the Secretary of the Interior and the accompanying report of the Commissioner of the General Land Office, and such lands have subsequently been included within a military reservation, can the title to said mineral lands be perfected by the private owner?"

For convenience the first and second questions will be considered together.

In an opinion heretofore given by this Department, addressed to you on the 15th of July last, wherein the subject of the authority of the President to reserve lands for public purposes came under consideration, it was observed that the power of the President to set apart for those purposes such portions of the public domain as are required by the exigencies of the public service to be thus appropriated, is too well established to admit of doubt; citing in this connection the case of Grisar *vs.* McDowell, (6 Wall., 381,) in which the Supreme Court remarks: "From an early period in the history of the government it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress." This power is in the above-mentioned opinion regarded as extending to any lands which belong to the public domain, and capable of being exercised with respect to such lands so long as they remain unappropriated. As thus defined the power is broad enough to include mineral lands belonging to the public domain, at least whilst they remain unaffected by any private right acquired under the laws relating thereto. I am satisfied with that view of the subject, and accordingly the first question is answered in the affirmative. This necessarily involves a negative answer to the second question; since, after the lands have once been lawfully reserved by the President for public uses, the lands so appropriated become severed from the public domain, and are thenceforth not subject to occupation and purchase under the general law.

The answer to the third question depends upon whether land covered by a mining-claim, where the locator of the claim has taken no steps to obtain a patent, and the premises still constitute a part of the public domain, may be lawfully reserved and set apart by the President for public uses. Under the laws providing for the exploration, occupation, and disposal of the mineral lands, the locator, so long as he complies with the conditions imposed by those laws, is clothed with a possessory right which entitles him to "the exclusive right of possession and enjoyment of all the surface included within the lines of his location." (See sections 2320, 2322, 2324 Rev. Stat.) The object of those laws is to promote the development of our mining resources, rather than the sale of the mineral lands, and to that end "Congress has, by statute and by tacit consent," as is remarked by the Supreme Court, in Forbes *vs.* Gracey, (94 U. S., 762,) "permitted the individuals and corporations to dig out and convert to their own use the ores containing the precious metals

which are found in the lands belonging to the government, without exacting or receiving any compensation for these ores, and *without requiring the miner to buy or pay for the land.* It has gone further," added the court, "and *recognized the possessory rights* of these miners, as ascertained among themselves by the rules which have become the laws of the mining districts as regards mining-claims." The rights thus recognized by Congress are property of great value. Very large amounts are invested in mines, the ownership of which rests solely upon the possessory rights referred to.

It seems to me that where such rights have attached to mineral land in favor of the locator of a mining-claim, the land during the continuance of the claim (*i. e.*, so long as it is maintained in accordance with law) becomes, by force of the mining laws, appropriated to a specific purpose, namely, the development and working of the mine located; and unless *Congress* otherwise provides, it cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart by the executive for public uses.

If, then, the possessory right of the miners, in the case under consideration, was full and complete previous to the establishment of the military reservation of Fort Maginnis, I am of opinion that the inclusion of their claim within the limits of the reservation was without authority of law, and could not legally divest them of such right; or of the further right (on compliance with the requirements of the statute concerning the issue of patents for mining-claims) to acquire title to the land.

J. P. SEARS.

Lodes discovered within the limits of a placer-claim, after application for patent for the placer-claim was filed, are no bar to issuance of patent as applied for.

Where a local law requires annual expenditures on placer-claim, failure to make such expenditures subjects the claim to re-location.

An expenditure of $500 is not required where an applicant bases his right to patent for a placer-claim on the provision in section 2332 relating to statute of limitations.

*Commissioner McFarland to Register and Receiver, Central City, Colorado, Nov.* 21, 1881.

The hearing in the matter of the protest of Theodore H. Becker against the application of J. P. Sears for patent for a placer-claim was held in pursuance of instructions, which were based upon the protest of said Becker, who claimed to be the owner of a valuable lode-claim located many years ago, which Sears had fraudulently included in his placer survey. Said hearing was ordered upon condition that Becker should file a certified copy of the location notice of said lode-claim, together with a diagram executed by a U. S. deputy mineral surveyor, showing the position of the lode-claim with reference to the placer-claim, and directed that testimony should be taken upon the two following points, to wit: First, whether a lode actually existed as alleged; and, second, whether such lode conformed to the diagram required to be submitted. Protestant having complied with the requirements stated, the hearing was held, the record of which is now before me.

Since the date of hearing counsel for Sears has filed in this office a relinquishment of the area embraced in the Soda lode survey, and for

this reason the questions in issue upon which testimony was taken need not further be considered.

There have been filed also since the date of hearing affidavits by Thomas B. Bryan and Ambrose E. Patten, residents of Idaho Springs, alleging that there are a number of lode-claims other than the Soda lode, and that affiants are each engaged in working the same.

These affiants allege nothing which will warrant this office in further suspending proceedings for patent. The fact, if admitted, that lodes are now known to exist within the placer-claim constitutes no bar to the issuance of patent, provided they were not known at the date of application for patent. The applicant, at the date of application, alleged under oath that no such lodes were known to exist, which allegation was supported by corroborative affidavits. I think the testimony taken at the hearing clearly shows that while there is a natural fissure filled with miscellaneous material which was located as the Soda lode, there never has been a pound of mineral-bearing ore taken therefrom, although it would seem that at different times various persons have thoroughly prospected the same by shafts, tunnels, and other excavations. Therefore the fact that the applicant has relinquished the area claimed as the Soda lode does not, in my opinion, affect the *bona fides* of the persons who made oath to the effect that no known lodes existed at the date of application for patent.

Becker filed with his protest the affidavits of William Hobbs, Robert Parker, and John H. Taylor, who each supported his allegations respecting the existence and location of the Soda lode. These affiants went somewhat farther, however, Parker and Taylor each alleging that he owned a portion of the premises applied for under placer locations, but without stating when said locations were made nor by whom; also that for the past ten years Sears had made no expenditure for labor or improvements connected with placer mining upon the premises applied for; and that neither Sears nor his grantors had expended $500 upon the claim for placer mining purposes, nor any sum to exceed from $50 to $75, the excavations, pits, shafts, cuts, water-boxes, pipes, etc., represented on the plat of survey and referred to by the deputy mineral surveyor in the field-notes, having been constructed and used for the purpose of supplying certain bathing-houses owned by Sears *et al.* with hot water from the hot springs which flow upon the land; and that consequently the certificate of the surveyor-general that $500 had been expended upon the claim for labor and improvements was erroneous, the said expenditures not having been made for the purposes contemplated by the act.

This office did not consider these objections to be pertinent matters of inquiry. In the first place, if Parker and Taylor claimed portions of this land, it was their duty to have filed adverse claims in the manner and at the time prescribed by section 2325 U. S. Revised Statutes. They fail to state when their alleged adverse rights accrued. Secondly, it does not matter whether Sears has performed any placer-mining work upon the premises since the date of application for patent or not, provided no person has made a re-location of the same. If the local laws of the miners, or the statutes of the State, require a certain amount of expenditures to be made annually in order to maintain a possessory title

to a placer-claim, undoubtedly a failure to comply with this requirement would render the land subject to re-location by any qualified person; but no re-location was alleged by protestants.

In regard to the third allegation, it is to be observed that the applicant based his application for patent upon a continuous occupation of the land for a period equal to that prescribed by the statute of limitations of the Territory of Colorado, to wit, from the summer of 1867 to the date of application for patent in 1873. There was nothing in the protest or the accompanying affidavits denying this allegation, which was contained in the claimant's original application for patent, and which has been reiterated in a subsequent affidavit, filed May 31, 1880. Practically, therefore, this alleged possession is not disputed, except by protestant's counsel.

The law in reference to this class of claims is found in section 2332 R. S., which provides that "where such person or association, they and their grantors, have held and worked their claims for a period equal to that prescribed by the statute of limitations for mining-claims in the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

The character of evidence to be furnished by a claimant in pursuance of the foregoing provision is contained in the regulations of this office, paragraphs 67, 68, and 69, with all of which the applicant has substantially complied. Having established his *right to the patent* by the means stated, the necessity for procuring a certificate from the surveyor-general, that the claimant had expended five hundred dollars for labor or improvements, was obviated.

If the claimant had held and worked his claim for five years, (the statutory period in Colorado,) in accordance with the requirements of local laws, (and this alleged fact, it must be remembered, has not been denied,) at the date of his application for patent, the law prescribes that this "shall be sufficient to establish his right to patent in the absence of any adverse claim;" and the fact that $500 has not been expended upon the claim by the applicant or his grantors constitutes no objection to the issuance of patent.

For illustration, the present law of Colorado, as cited by counsel for Becker, requires that $12 shall be expended annually upon each placer-claim of less than 20 acres, in order to maintain the possessory title thereto. A possession for five years in compliance with this requirement would involve an aggregate expenditure of $60, a sum not exceeding the amount admitted by protestants to have been expended by the present applicant or his grantors. Yet such a possession would entitle the applicant to patent in the absence of any adverse claim, although manifestly no certificate could be procured from the surveyor-general that $500 had been expended thereon.

Considering this case with reference to the matters alleged in the protests submitted therefrom, I must conclude that no valid objection to the issuance of patent exists. The survey requires amendment in such manner as to exclude the area relinquished as the Soda lode claim. I find by examination of the papers in the case that the original applica-

tion for patent, including affidavit of citizenship and of possession, which was attached to the field-notes of survey, is missing, having become detached by being torn off. These papers were returned to your office with letter dated April 30, 1880, and I find in place of the missing paper a new affidavit filed in your office May 31, 1881.

PUBLICATION OF NOTICE.

**The published notice in mining applications must be in reputable newspapers published nearest the claims in question.**

*Commissioner McFarland to Register and Receiver, Central City, Colorado, Nov.* 25, 1881.

I have considered the protest submitted by John Tomay *et al.* against the issuance of patents to Osmer C. Stewart for the Roscoe Conkling and James G. Blaine mining claims.

The applications for patent in these cases were filed on the 13th day of July, 1881, and the register directed that notices thereof should be published in the Georgetown *Courier*, a weekly newspaper, which order was duly carried out, and said notices were published in said paper from the 14th day of July, continuously thereafter until the 15th day of September, 1881, the full period prescribed by the statute.

On the 14th day of September adverse claims were filed in your office, as follows, to wit:

1. By the Colorado Territory National Silver Mining Company, claiming ownership to the Baltimore, Boaz, Hattie, Fenton, Washington, and Jay lodes, and alleging conflict with the James G. Blaine lode-claim.

2. By the same company, alleging ownership of the Hattie lode and conflict with the Roscoe Conkling lode.

3. By John Tomay, alleging ownership of the Baltimore lode, and conflict with the James G. Blaine lode.

Mr. Tomay appeared as agent, duly authorized by power of attorney, for said company, and verified all of said adverse claims under oath.

The register thereupon notified all parties in interest of the filing of said adverse claims, and informed them that the adverse claimants were required to commence suit within thirty days from the filing thereof.

On the 18th day of October, 1881, suits were commenced in the district court for Clear Creek county, as follows, to wit:

Nicholas Popplein, Tallmadge F. Cherry, George J. Popplein, John Roche, Francis Henry Boggs, Alexander Brown, Glen A. Fenton, trustees, etc., and the Colorado Territory National Silver Mining Company, plaintiffs, *vs.* Osmer C. Stewart, defendant; John Tomay, plaintiff, *vs.* Osmer C. Stewart, defendant.

The law (sec. 2325 R. S.) prescribes that "it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

The suits hereinbefore recited having been commenced by the filing of complaint on the 18th day of October, or thirty-four days after the filing of the adverse claims on the 14th day of September, were not commenced in conformity to the provisions of the statute in the matter of

time; hence you held that the adverse claims were constructively waived, and allowed the applicant to pay for and enter the land embraced in his applications.

It appears that the said Nicholas Popplein, Tallmadge F. Cherry, George J. Popplein, John Roche, Francis H. Boggs, Alexander Brown, Glen A. Fenton, trustees, etc., co-plaintiffs in two of the actions, are trustees for the Colorado Territory National Silver Mining Company.

Having failed to commence their actions within the statutory period, the above-named plaintiffs, representing said company, and John Tomay, filed in your office a protest against the issuance of patent, wherein they allege that the applicant for patent has failed to comply with the law in the matter of publishing notices of his applications for patent. They allege that the Georgetown *Courier*, the newspaper in which such notices were published, is published at Georgetown, a point about three miles east from the location of the claims applied for; that during said period of publication the *Silver Plume Mining News* was regularly published, at weekly intervals, at the town or camp of Silver Plume, situated about one mile east of the said mines, and lying between them and the town of Georgetown, which *Weekly Mining News* was a reputable newspaper of general circulation. The notices not having been published in the newspaper published nearest the claim, protestants urge that the law has not been complied with, and the applicant is not entitled to patents.

Upon the clear showing of the record the protestants had due notice of the pending applications for patent, and in pursuance thereof appeared to contest the right of entry by filing adverse claims in the manner prescribed by the statute, although they subsequently waived said adverse claims by failure to commence suits within the period prescribed by law. Having accepted notice and acted thereon, it might be questioned whether they are not estopped from alleging want of notice at the present time.

The law (sec. 2325 R. S.) provides that "the register of the land-office, upon the filing of such application, * * * shall publish a notice that such application has been made for the period of sixty days in a newspaper to be by him designated as published nearest to such claim." Admitting that the *Mining News* is a reputable newspaper published nearer the mining-claim by usually travelled routes than the Georgetown *Courier*, it is clear that the applicant for patent was not at fault, for by the terms of the statute above recited the notice must be published in the newspaper *designated by the register as published nearest the claim*, and in this particular the *applicant* strictly complied with the law, although the register disobeyed its directory provisions. Had the applicant published in the *Weekly Mining News* instead of the *Courier*, as directed by the register, there would have been a manifest failure to comply with the law, which would have vitiated the notice. The applicant for patent is remediless where the register makes an erroneous designation of the newspaper as the medium of publication, if the objections urged by these protestants are well taken.

However, in the case of the Omaha quartz mine, (see p. 198,) the Honorable Secretary Chandler, December 1, 1876, ruled as follows: "The notice was published in the Nevada *Transcript*, a paper

published in Nevada City, a town situated about six miles from the mine, and the publication was made by direction of the register. It appears that in Grass Valley, a town situated about two miles from the mine, two papers are published, a daily and a weekly. * * * In this case the register has exercised his discretion, disregarded the papers published at Grass Valley, and selected another. I see no warrant for the exercise of this discretion. Under the provisions of the statute the public have the right to look to the paper issued nearest the claim as the one in which a notice of application should appear. If any discretion is allowed the register, where shall it be limited? If he may ignore a paper published two miles from a claim, and designate one published six miles distant, he may designate one published at a much greater distance. * * * If two or more papers of *repute* are published equidistant, or very nearly so, from the claim, the register must designate the one in which the notice shall appear; but in other cases the paper published nearest the claim must be designated, provided the same is a reputable newspaper of general circulation."

The Hon. Secretary, recognizing the fact that the applicants were not at fault in the foregoing case, directed that the same should be submitted to the board of equitable adjudication, which direction was carried out and the entry was confirmed by said board.

This present case being on all fours with that of the Omaha quartz mine, and the protestants having had actual notice of the applications, it is clearly the duty of this office to lay the entries before the board for its action, at the same time recommending their confirmation, provided it has been clearly shown that there was a *reputable newspaper of general circulation* published nearer the mines in question that the newspaper in which the notices were actually published.

This office has heretofore been supplied by the publisher of the *Mining News* with a complete file of his newspaper, wherefrom it appears that the first number was issued on the third day of June, 1881. Its general "make-up" typographically, and paucity of advertising patronage, together with the earnest editorial appeals made to the Silver Plume public for support, did not indicate, at that date, a very prosperous condition, general circulation, or reputation other than a notoriety for typographical errors. It is alleged, under oath, by J. S. Randall, that on the 24th day of October, 1881, he purchased, on behalf of C. M. Randall, the entire plant of this newspaper enterprise, embracing type, material, subscription list, and advertising patronage, for the sum of $500; that he found the entire subscription list to be but ninety-five copies, and the advertising patronage totally insufficient to warrant the further continuance of publication; hence no further publication was made, and the last issue of the *Silver Plume Mining News* appeared on the 21st of October. Affiant also states that the said paper could not, by any possibility, have been maintained from the combined advertising and subscription patronage to be derived from Silver Plume. It appears that the proprietor, E. A. Benedict, formerly published a newspaper at Idaho Springs, in your mining-district, called the *Iris*, which suspended publication on the 9th of October, 1880, during the pendency of several notices of mining applications.

If these allegations be true, and it be the duty of the register to

designate the *nearest reputable* newspaper of *general circulation*, as indicated by the language of the Honorable Secretary in the Omaha quartz mine case, it would seem that the register was not in error in designating the Georgetown *Courier* as the medium of publication.

In the absence of any counter-allegation denying the facts recited in Mr. Randall's affidavit, made by persons having interests which would be adversely affected by the issuance of patents in the present case, and who shall show that they did not have actual notice of the pending applications, I know of no reason why the showing of the applicants should not be conceded.

To conclude, if the register selected the wrong paper, it is the duty of this office to refer the entries to the board; if otherwise, and the proper newspaper was designated, the entries should be approved by this office without such reference. As at present advised, I see no reason to suppose that the register has performed his duties improperly.

The protest is therefore dismissed.

BODIE TUNNEL AND MINING CO. *vs.* BECHTEL CONSOLIDATED MINING CO. *et al.*

A tunnel location under the United States mining laws is a *mining-claim*, and can be an adverse claim.

Having failed to file an adverse claim and commence suit as provided by statute, the tunnel company must be held to occupy the position of protestant.

The case of Corning Tunnel Co. *vs.* Pell (4 Colorado, 507) does not support the position that there may be adverse mining-rights under tunnel locations that cannot be adjudicated in the courts.

While the Department has no jurisdiction to determine controversies as between adverse mining-claimants, where sufficient allegations have been made to indicate, if true, that the applicant for patent has not complied with law, or is not entitled to a patent, an investigation should be held as in agricultural cases.

*Secretary Kirkwood to Commissioner McFarland, Dec.* 12, 1881.

I have examined the papers forwarded with your letter of 29th October last, in the matter of the protest of the Bodie Tunnel and Mining Company against the several applications of the Tioga Consolidated Mining Company and the Bechtel Consolidated Mining Company for patents for certain mining-claims in Bodie land-district, California.

On the first day of July, 1880, the Tioga company filed several applications for the following-named mining-claims: The Red Lyon, the Midsummer, the Lady Locke, the Central, the Northern Extension Standard, the Sutro, the Clipper, the Tioga South, and the December, and entered the same October 8, 1880.

The Bechtel company filed like applications July 1, 1880, for the Sitting Bull, the Central, the Argentine, the San Francisco, the Pennsylvania, and the Ohio mining-claims, and entered the same October 15, 1880.

During the period of publication of said applications, to wit, on August 31, 1880, the said tunnel company filed with the register of the Bodie land-office a written instrument in the nature of a protest, styled by the company as follows: "Sworn statement and petition of the Bodie Tunnel and Mining Company." The paper was sworn to by Thomas Buckley, superintendent of said tunnel and mining company, and set forth that, on the 28th day of September, 1877, F. Tagliabue, a citizen of the United States, above the age of twenty-one years, duly located a tunnel claim under section 2323 Revised Statutes, on the west

side of Bodie bluff, in the Bodie mining district, Mono county, California.

The description of the claim contained in a certified copy of the tunnel notice, attached to the said petition or protest, is as follows: "This claim commences at this notice, being ten feet westerly from the mouth of the Old Bodie tunnel, and about one thousand feet, more or less, in a northerly direction from the Blasdel tunnel, and runs in an easterly direction three thousand feet; and I hereby claim seven hundred and fifty feet on each side of said tunnel, and each blind and undiscovered ledge struck by said tunnel," etc.

This notice was filed for record in the office of the county recorder of Mono county, September 29, 1877.

The claim was surveyed November 14, and the field-notes and plat thereof filed for record in the office of said county recorder November 15, 1877, as appears from copy of said plat and field-notes attached to said petition or protest, from which it would also appear that the line of the tunnel and the exterior boundaries of the surface claimed were marked by posts; but whether so marked before survey does not appear. The surface-ground claimed is in the form of a rectangular parallelogram, 3,000 by 1,500 feet.

The petition or protest further sets forth that work upon said tunnel has been continuously and diligently prosecuted ever since the date of said location; that said tunnel and mining company is the owner of said claim by purchase; that all of the above-named mining-claims of the said Tioga and Bechtel companies lie across the central course of said tunnel; that the work on the tunnel has not progressed far enough to discover veins or lodes within or under the surface-ground of the several claims applied for by the Tioga and Bechtel companies; and that the affiant is informed and believes that several of the locations thereof are mere surface locations, in which no vein or lode has ever been found at all, and the locations of which were made subsequently to the tunnel location. The names of the claims alleged to have been thus located are not given, but reference is made to the abstracts of title accompanying the applications for patents for ascertaining what claims of the said Tioga and Bechtel companies were located subsequently to the location of the tunnel claim.

From a statement in your decision of August 24, 1881, it appears that the Midsummer, Lady Locke, Central, North Extension Standard, Clipper, and December, of the Tioga company's claims, and the Sitting Bull, Argentine, San Francisco, Ohio, and Pennsylvania, of the Bechtel company's claims, were located subsequently to September 28, 1877.

The said tunnel company declared that it claimed all veins, lodes, or ledges which it may discover in extending its said tunnel, which cannot be traced upward to the surface; in other words, veins, lodes, or ledges which were not known to exist prior to the tunnel location.

The tunnel company did not in terms protest against the issue of patents to the Tioga and Bechtel companies; but after the recital of facts and allegations upon which it relied, closed the petition with two prayers, to the following effect:

First. That in the event of patents being issued upon any of said applications, they should contain words making the grant subject to the lawful rights and claims of the Bodie Tunnel and Mining Company.

Second. That in the event of such patents being granted for any of said claims, the location of which was subsequent to the date of the tunnel location, a clause be inserted therein, excepting and excluding from the grant any and all veins, lodes, ledges, or mineral deposits that may be cut, intersected, or discovered by said tunnel company in running and excavating said tunnel, which had not been discovered and located prior to September 28, 1877.

Upon this paper the company rested, and did not institute proceedings in court, as provided by section 2326 Revised Statutes.

Upon the argument of the matter the counsel for the Bodie Tunnel and Mining Company raised objections to the validity of some of said applications not alleged in the petition or protest, one of which was that the Red Lyon location was invalid in this, that the location was 489 feet in width, while the mining laws or rules and customs of miners in that district limited the width of lode-claims to 100 feet, and it was contended that patent to said claim could not issue for more than 100 feet in width.

In your decision of August 24, 1881, you held substantially as follows:

First. That it was necessary for the rights of the tunnel company that suit should have been brought in court, as provided by section 2326 Revised Statutes, and that, as said company failed to institute such proceedings, its adverse claim was waived, and that it cannot be adjudicated by this Department.

Second. That the Bodie Tunnel and Mining Company, having failed to establish any claim or right or interest, present or prospective, to or in the tracts applied for by the Tioga and Bechtel companies, it is not competent to insert any clauses of reservation in the patents to be issued upon said applications.

Third. That the Red Lyon location was not limited to 100 feet in width, because it appears that after the year 1869 the Bodie mining camp was abandoned, and for many years the laws, rules, and customs thereof were disused; that during this period the act of 1872, allowing 600 feet in width to a lode-claim, was passed; and that before any local law or regulation was thereafter adopted by miners in the district in which said claims are situated, limiting the width of claims to less than the statute allows, the Red Lyon was located, and hence that at the time of its location it was lawful to locate to the extent of 1,500 feet in length and 600 feet in width in that district.

Fourth. That as the Midsummer, Lady Locke, Central, North Extension Standard, Sutro, Clipper, and a portion of the Tioga South are within the limits of the Red Lyon, and subsequent in location, the entries thereof are invalid, and were held by you for cancellation.

Fifth. Without deciding that the other claims should pass to patent, you decided that they should be regularly disposed of, and dismissed the petition or protest.

From all your rulings and decisions in this matter the tunnel company filed an appeal, which you dismissed by decision of October 5, 1881, upon the ground that the said tunnel company held the position of protestant merely, and was not entitled to appeal under the rule laid down in McGarrahan *vs.* Boston Mine, Boston H. M. Co. *vs.* Eagle Cop-

per Co., and Lombard *vs.* Mt. Pleasant Mg. Co. Thereupon the matter was brought here under practice rule 83.

Without intending to question or infringe the rule above stated as to appeals, I deem it proper, in view of the importance of some of the questions raised and of the earnestness and ability of the arguments presented by counsel on both sides, to briefly review your decision, by virtue of my supervisory powers, and not in my appellate capacity. In doing this, I do not consider it necessary to set out the specific points of exception noted in the appeal. It will be sufficient to take up the several points decided by you as above set forth, they, in my opinion, covering the whole case, and being altogether excepted to.

As to the first point, it is evident to me that the claim of said tunnel and mining company must of necessity be a *mining-claim*. It is a claim under the mining laws of the United States, if it is any claim at all. It follows that if this claim conflicted with the claims of the Tioga and Bechtel claims, which are mining-claims, it was an *adverse claim*. Due publication of notice of the applications of the Tioga and Bechtel companies was had. This is not questioned. Section 2325 Revised Statutes provides that "if no adverse claim shall have been filed with the register and receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer, of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." It is not claimed that the paper filed by the tunnel company was intended as an adverse claim under sections 2325 and 2326 Revised Statutes; but if it had been, the tunnel company would be in no better position than if no adverse claim had been filed; because section 2326 Revised Statutes, provides that "it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question as to the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

It is therefore evident that the tunnel company must be held as occupying one of two positions. It either filed no adverse claim at all, and the land department must assume that none exists; or else, having filed one, it waived it by failure to institute proceedings in court, and hence it must be assumed that none exists. As affecting the matter under consideration, it is immaterial which position it is held to occupy, as the result is the same in either event. This Department has not otherwise construed these two sections as regards adverse claims, and Mr. Justice Field in the Eureka case said: "The silence of the first locator is, under the statute, a waiver of his priority." See opinion of court in 4 Sawyer, at page 318. This judgment was affirmed by the Supreme Court. See 13 Otto, 839.

But it is urged by counsel for the tunnel company that it has not such a claim as can stand in court; that the rights claimed cannot be protected in a court of competent jurisdiction, etc.

To say this is to say that the tunnel company has no rights at all.

But counsel insist that it has rights granted by statute. If that be so, then clearly they can be protected in court against any conflicting mining right or claim. In the view I take of the mining law, there is not a right that can be acquired thereunder which cannot be fully protected in court as against any other conflicting right or claim arising under the same laws except that of the United States. This is the very foundation of the system of the mining laws. Prior to Congressional enactment of mining laws, miners had their local laws, rules, and regulations, by which they were governed, regarding their mining-claims, and all their rights thereunder when in dispute or conflict were adjudicated by the courts. Courts, of course, did not undertake, any more than now, to dispose of the title of the government, over which they had no jurisdiction. But as regards the rights of miners, not as against the United States, but as against each other, courts took jurisdiction, and that jurisdiction was recognized and continued by Congress when it framed and enacted the mining laws. The United States mining laws are in a sense supplemental to the system that had already grown up in the absence of Congressional enactment. They in no sense wiped out, destroyed, or essentially changed that system, but continued it in vogue. (Broder *vs.* Water Co., 11 Otto, 274.) So far as the actual operations of mining were or are concerned, that system was and is all-sufficient. Congress made certain definitions as to what should be deemed mining-claims, as regards location, etc., and enacted the manner of making locations, amount of labor and money to be expended, etc., etc.; but the prominent feature of the mining system, of asserting rights in courts under the local rules of miners and the laws of the States and Territories, was not changed, but especially authorized by sections 2324, 2325, and 2326 Revised Statutes.

I know of no case wherein the courts have refused to recognize rights under tunnel locations. The attorney for the tunnel company at San Francisco cites the case of the Corning Tunnel Company *vs.* Pell *et al.* (4 Colorado, 507) to support the position that there may be adverse mining rights or claims under tunnel locations that cannot be adjudicated by the courts; but as I understand that case, it gives no support to that position. Section 2323 Revised Statutes provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel *on the line thereof*, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface, and that locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel and while the same is being prosecuted with reasonable diligence, *shall be invalid.*

Now, in the case of Corning Co. *vs.* Pell *et al.*, the court defined what is meant in the law by the words "on the line of such tunnel." It was insisted in that case, as is claimed here by the protest or petition, that the line of the tunnel means 1,500 by 3,000 feet as surveyed and staked as the tunnel claim; and that a location within such limits was invalid.

But the court construed the line of a tunnel, as intended by the act,

as designating "a width marked by the exterior lines or sides of the tunnel." The evidence showed that the slide lode, which was claimed by the tunnel company, was 55 feet from the centre line of the tunnel, and the court, therefore, under its construction of the law, held that the location of said lode "was not on the line of appellant's tunnel." The court then stated as follows: "What the appellant's rights would have been had this fact been otherwise it is not necessary to determine."

The tunnel company in that case was defeated in court, because it showed no right or claim to the slide location, under the court's construction of the law, and the case was not defeated upon the ground that there are no rights under tunnel locations that courts can maintain or preserve.

But counsel for the tunnel company insist that this Department should hold all of the locations of the Tioga and Bechtel companies which were made subsequently to the tunnel location to be invalid, because the law provides that such location shall be invalid. From what has been said it is clear that this Department cannot pronounce any such judgment, because it has no jurisdiction to inquire into the facts upon which the demand is founded. It is said that the fact that these locations are on the line of the tunnel is one that appears of record in the Department, and that I am bound to take notice thereof; but it is only necessary to call attention to the fact that there is no record of mining locations in the land department. They are recorded with a mining recorder, under local rules of miners, or in the county records of the county in which the claims lie, and the facts relative to mining locations can be shown in the land department and the courts only by evidence *dehors* the proper records of such department or the courts. It is a matter of proof that does not appear from our records. It may be made to appear as an item of evidence in the record of a case, but not from the records of the Department of which I am bound to take notice. The fact might have been presented in court, but it cannot be made to appear here in the case as it now stands.

From the view, therefore, which I take of the mining law, the only place in which the controversies between conflicting mining claimants or adverse claimants can be heard, is a court of competent jurisdiction.

What has already been said disposes of the second point decided by you. It is not competent to insert clauses of reservation of rights fully waived. In saying this I do not intend to hold that patents ought to issue to the Bechtel and Tioga companies, that question not being before me.

As to the third point, your holding as to the Red Lyon location seems to be in accordance with prior rulings of your office, this Department, and the courts, as per your citation. (General Land Office letter to this Department, September 2, 1878, and concurrence therein by my predecessor September 28, 1878, to Attorney-General; and Jupiter Mg. Co. *vs.* Bodie Mg. Co., Copp's L. O., vol. 8, p. 60.)

On the fourth point, as no appeal has been taken from your decision holding the entries of the Midsummer, Lady Locke, Central, North Extension Standard, Sutro, Clipper, and Tioga South for cancellation, so far as they conflict with the Red Lyon entry, it must stand.

Finding no error in your conclusions as above set forth, I must of ne-

cessity also find that there was no error in your decision of October 5, 1881, dismissing the appeal, and the same is affirmed.

I desire to say that while I am of opinion that controversies between adverse mining claimants cannot be heard and determined before this Department, I am nevertheless of the opinion that where, under the last clause of section 2325, third parties present evidence by affidavits, etc., to show that an applicant has failed to comply with the mining statutes, if the evidence is of such character as to entitle it to credit, and if the allegations are such as is proven in regular proceedings, would show that the law has not been complied with, that patent under the law ought not to be issued, or that you have no jurisdiction to issue the patent, then it is your duty to order an investigation as between the government and the applicant, as in similar cases of agricultural entries.

With this rule in view, I submit for your consideration the allegations contained in the affidavit accompanying the application of the tunnel company under practice rule 83.

### TOWNSITE OF DEADWOOD.

**Because unsurveyed lands are in the vicinity of known mines does not create a presumption of their mineral character. Only in case the lands have been, in some manner, previously designated as mineral, should the burden of proof be cast upon the agricultural claimants thereon.**

**By "lands valuable for minerals," in section 2318 R. S., is meant lands which it will pay to mine by the usual modes of mining.**

**Placer lands are not subject to townsite entry, and it is not competent to insert clauses of reservation in the mineral or townsite patents, for the surface is absolutely required for the full enjoyment of the lands by either placer or townsite owners.**

*Secretary Kirkwood to Commissioner McFarland, December* 19, 1881.

I have considered the appeal of Joseph V. Offenbacher, probate judge of Lawrence county, Dakota Territory, from the decision of your office of February 4, 1880, holding for cancellation cash entry No. 2 of the townsite of Deadwood, Deadwood land district, Dakota Territory, for the reason that all the land embraced thereby is placer mining-ground and valuable for minerals.

A motion was made in behalf of some of the mineral claimants to dismiss the appeal, on the ground that the townsite was simply a protestant without right of appeal. While this may be true as to lands entered under the mining laws prior to July 29, 1878, date of townsite entry, it is not true as to other lands, as to which the appeal must be considered and the motion overruled. As to the lands entered prior to July 29, 1878, under the mining statutes, the testimony will be considered as if taken upon an official investigation of the validity of said entries.

On the 17th of June, 1878, Jno. R. Fraser, probate judge of said county, made an entry of the townsite of Ingleside; and on the 29th of July, 1878, acting in the same capacity, he made the Deadwood townsite entry, which embraces all of Ingleside. His successor asked to have the Ingleside entry cancelled.

You held the entry for cancellation, from which action no appeal was taken. This matter, therefore, requires no further consideration in connection with the case. The case presents three questions for decision, viz:

First. Is the land included in the townsite entry or any portion thereof placer mining-ground and in contemplation of law valuable for minerals? Should this point be resolved in the affirmative, then—

Second. Is such land subject to townsite entry?

Third. In the event it should be decided to issue patents for mineral-claims within the townsite limits, and a patent upon the townsite entry, or a portion thereof, would it be competent to insert therein clauses of reciprocal reservations in favor of the mineral and townsite claimants?

It is true that in the argument of this case another question, that of priority of occupation as between mineral and townsite claimants, was discussed and urged upon my attention; but it seems to me that the question does not properly arise in this case, if, indeed, it can in any case in which title is sought to the same land by placer and townsite applicants.

The facts bearing upon this point are briefly as follows:

The Black Hills country, in which the lands in question are situated, was embraced within the lines of the reservation set apart to the Sioux Indians by the 2d article of the treaty of April 29, 1868, (15 Stats., 635.) In said article it was solemnly agreed, on the part of the United States, that no persons, except those designated in the treaty, and thereby authorized so to do, and except such officers, agents, or employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, should ever be permitted to pass over, settle upon, or reside in the territory described in said article. This was the status of the lands until the ratification of the agreement between the United States and the Sioux, by which the Black Hills country was relinquished to the United States, to wit, February 28, 1877, (19 Stats., 254.)

It appears from the testimony that as early as 1875 miners had commenced operations in the vicinity of the present city of Deadwood, and from that time forward people rushed in there in great numbers, so that in 1876 there was a large community in that vicinity, not only engaged in mining, but in various other pursuits. The miners established *quasi* mining-districts, adopted local rules and regulations, and thereunder located mines. The inhabitants of the town that had sprung up also organized a municipal or *quasi* municipal government early in the spring of 1876, and laid out a town, establishing streets, alleys, blocks, and lots upon the ground located as mineral. Frequent conflicts and controversies arose between the miners and the self-constituted town authorities, which resulted, in many instances of regular mining operations, in a suspension of mining in the thickly-settled portion of the town prior to the ratification of said agreement; but many of the claims located appear never to have been regularly worked. These things occurred while the land was in an Indian reservation, and it follows that the occupancy of the land, both by the miners and the townspeople, was in open violation of solemn treaty stipulations, and that none of the parties were there with even a shadow of right. There were no valid mining locations or townsite selections. This was the condition of affairs when the agreement aforesaid was ratified; and when the country fell into the category of public lands, February 28, 1877, this mixed hostile occupancy and claim existed, and continued about the same until the time of the investigation before the local office.

After the ratification of said agreement the mining claimants re-located their claims, in many cases covered by town improvements, and some of the mining claimants secured surveys and made entries; the town authorities also procured a survey of their site and entered the land, which entry was allowed by the local officers, regardless of the prior entries by the mining applicants.

Thus it appears that, as regards the claims about which testimony was taken, there was no priority in either the town or the mineral claimants in respect to occupancy or selection, none of them having any right there prior to February 28, 1877.

As touching the first question for decision, it appears that the local officers ruled that in all cases the parties claiming the land as mineral should first introduce their testimony in support of their claims, thus throwing the burden of proof in each case upon the mining claimant.

This your office decided to be erroneous, holding that the presumption was that all the land embraced in the townsite entry was valuable for minerals, and that this presumption should be overcome by competent proof before an entry other than under the mining laws would be allowed. The grounds upon which your office so decided, as stated in the decision, are that the townsite entry was upon unsurveyed lands; that the lands were in a well-known mineral region; that several mining-claims had already been entered and many located, and that it is well-known as matter of recent history that the mineral character of the locality was the incentive to the immigration which peopled the district, and resulted in the release of the same from the Indian reservation, and made necessary the establishment of a U. S. land-office at Deadwood.

Except as regards lands that had already been entered under the mining laws before the entry of the townsite, I think your ruling was erroneous, as was that of the local officers regarding the lands forming the above exception.

The fact that land is unsurveyed is not evidence that it is valuable for minerals. It may be true that as a matter of recent *political* history, the fact that it was understood that there were valuable mineral deposits in the country of the Black Hills induced the making and ratifying of the agreement for the relinquishment of that territory; but this falls far short, in my opinion, of establishing the fact that all the land thus relinquished was valuable for minerals, or a presumption that it was such. It was not described as mineral either in the agreement with the Sioux Indians, or in the act of Congress ratifying that agreement.

It is true that the Black Hills land-district was established by executive order of March 10, 1877, by virtue of section 2343 of the Revised Statutes, but that had not the effect of withdrawing all the lands from other disposition than under the mineral laws. The register and receiver were not so restricted in their jurisdiction by that order, which, giving it its widest scope and full force, can only be held to evidence this: that it was deemed necessary by the President to establish that land-district for the public convenience in executing the provisions of chap. 6, title xxxii of the Revised Statutes—in other words, a public convenience for securing patents to such mines as might be discovered in that district. But it never has been held that the establishment of a land-district by virtue of said section limits the jurisdiction of the local officers in cases

arising under said chaper, or excludes any of the lands of the district, *proprio vigore*, from disposal under general laws. On the contrary, the fact is shown from your records that many pre-emption and homestead entries have been made at the Deadwood office, and are disposed of in due course by your office.

Prior to April 22, 1880, it had been the practice to withdraw lands in well-known mineral regions or belts from sale except under the mining laws, and before other disposition could be made of them positive proof of their non-mineral character was required from the parties applying to purchase them as agricultural or non-mineral lands. (See sec. 2341 R. S.) But, outside of California, (see sec. 3, act of March 3, 1853, 10 Stats., 245, repealed by sec. 16, act of July 9, 1870, 16 Stats., 218,) this was only in cases in which the lands were withdrawn by the land department. By decision of my predecessor, of April 22, 1880, (see your circular of April 27, 1880,) all such withdrawals were revoked, and, as stated in the decision, the "policy or practice of throwing the burden of proof upon agricultural claimants" was reversed.

Thus it would appear that in order to require positive and undoubted proof by an agricultural claimant that lands are non-mineral in character, it was necessary that the land should have been designated as mineral, either by the return of surveyors-general, or by withdrawal as such by the proper authorities, or by some sort of action or decision upon proof of their mineral character. United States surveyors in making surveys are required to note the true location of all mines, and surveyors-general to make proper return thereof, (sec. 2395 R. S., paragraphs 7 and 8;) and even in California, under the act of 1853, it must have been in some way determined that lands were mineral in order to exclude them from subdivisional survey.

The construction of the law by your office in this case would withhold all of the Black Hills country from disposal otherwise than under the mining laws, unless claimants under other laws should first demonstrate beyond doubt that the land they desired to purchase was merely non-mineral in character. Such a ruling is not justified by any of the records of this Department, nor by its practice or decisions.

Your office truly stated that it is the policy of the government to encourage the development of mines; but to so construe the law that title to lands covered by a town could not be secured in mining regions, would not, in my opinion, be in pursuance of this well-recognized policy, but clearly against it; for miners, like other people, must have residence and conveniences for transacting business, and other conveniences of civilized life, which can only be afforded by the establishment of towns. Towns are as essential to them as is mining machinery. There can be no very important mining community without its accompanying town or mining "camp."

That mines were entered prior to the entry of the townsite, and within its limits, must certainly be held as proof of the valuable mineral character of the lands thus entered; and it follows that, where such entries are sought to be vacated on the ground that the lands are non-mineral, the burden of proof is upon the government to show the non-mineral character of the lands. To this extent, therefore, the ruling of your office was correct, and that of the local officers erroneous; but as to the

other land, the presumption is, the government having sold it under the townsite laws, that it was subject to townsite entry; and before that entry can be vacated as to that land, because of its alleged mineral character, it devolves upon the parties claiming it as mineral, or where not so claimed upon the government, to show it to be valuable for minerals.

When the government has once actually sold a tract of land, it no longer belongs to the United States, and the government cannot sell it again, nor make other disposition of it in any manner. (Carrol *vs.* Safford, 3 How., 441; Weatherspoon *vs.* Duncan, 4 Wall., 210; Hutchings *vs.* Low *et al.*, 15 Wall., 77.) Now, in the matter under consideration, the records of your office evidence sales of lands to divers applicants under the mining statutes prior to July 29, 1878, and a sale of other land under the townsite law. In either case, before this record can be changed, and the government assume further control of the lands, it must be made to appear in some way that the law has not been complied with, and hence that no sale has actually been made. On the one hand attempt is made to show that no sale has taken place, on the ground that the land sold under the mining laws is not valuable for minerals; and on the other hand that no sale has been made under the townsite laws, because the land is valuable for minerals. To succeed in either case, the alleged legal defect must be shown by competent legal evidence.

What I understand to be meant by the words "lands valuable for minerals," in section 2318 R. S., is lands which it will pay to mine by the usual modes of mining; and that this is the proper rule to apply when the character of land is drawn in question. * * *

Regarding the second question, it must be held, in view of sections 2318 and 2392 of the R. S., that the lands herein found to be valuable for minerals, being placers, are not subject to townsite entry, and to that extent the townsite entry of Deadwood should be cancelled; but it should remain intact as to the residue, provided that in other respects it is regular and valid. The question of regularity or validity of the townsite and mineral entries, except as to the character of the land, not being raised in this case, is not in any way decided by me, except so far as the character of the lands is concerned.

As to the third question, I agree with you that it is not competent to insert clauses of reservation in the townsite or mineral patents, the surface being absolutely required for the full enjoyment of the lands by either placer or townsite owners.

### LODES IN TOWNSITES.

**Where lode-claims were located and held in accordance with the mineral land laws prior to the occupation of the townsite claimants, no reservation in behalf of the town occupants should be made in the patent issued to the mining claimants.**

*Secretary Kirkwood to Commissioner McFarland, Dec.* 30, 1881.

I transmit herewith a copy of an opinion of the Acting Attorney-General, dated the 24th inst., addressed to the President, and by him referred to this Department, upon the authority to insert in mineral patents for lode-claims a reservation in favor of town claimants or occu-

pants, in cases in which such mineral claims lie wholly or in part within townsite limits.

The Acting Attorney-General is of opinion that except in cases wherein it is established to the satisfaction of the land department that mining-claims existed and were possessed throughout their entire extent prior to townsite locations, and that the possessory rights of mineral claimants have since been held and maintained in accordance with the mineral land laws, it is competent to insert in lode-claim patents the usual reservation in favor of townsite claimants and occupants.

Clearly it must be assumed *prima facie* that a mineral claimant who shows a right to a patent has possessed his claim and maintained his right to possession thereto in accordance with the mineral land laws. In such a case, therefore, the only other question to be determined is that of priority of right by selection or location, as between a townsite and a vein or lode mining claimant.

The opinion is adopted as the rule of the Department in the class of cases coming within its scope.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Dec.* 24, 1881.

The PRESIDENT:

SIR: I have considered the application of James H. Mandeville, Esq., made in behalf of the Vizina Consolidated Mining Company of Arizona, relative to the patenting of a mining-claim to that company, which was on the 9th inst. by your direction referred to the Attorney-General for an opinion thereon.

The applicant states, in his communication to you of that date, that a patent to said company for the Vizina mining-claim has been prepared, against his protest, with a reservation in favor of the city of Tombstone, Arizona, and now lies on the table of the Commissioner of the General Land Office, ready for delivery. He claims that the insertion of such reservation in the patent is contrary to law; and he asks the President to direct that another patent to said company be prepared without the reservation.

In issuing patents for mining-claims upon veins or lodes, it is the practice of the land department, where it appears that the surface-ground of any such claim lies wholly or partially within the limits of a previously located, entered, or patented townsite, to insert in the patent a clause (as has been done in the present case) excepting from the grant all townsite rights in the premises. The clause is in these words: "Excepting and excluding, however, from these presents, all town property rights upon the surface, and there are hereby expressly excepted and excluded from the same all houses, buildings, and structures, lots, blocks, streets, alleys, or other municipal improvements on the surface of the above-described premises, not belonging to the grantees herein, and all rights necessary or proper to the occupation, possession, and enjoyment of the same." The insertion of this clause does not rest upon any express statutory requirement, but is founded upon the view that the previous location, entry, or patent of townsite, while not conferring any right to the underlying veins or lodes, (sec. 2392 Revised Statutes,) gives nevertheless to the townsite occupants *surface* rights to which those of the subsequent mineral claimant are necessarily subject, and

that, by giving the latter a patent with a reservation saving the rights of the townsite, all that the law contemplates to be granted by the patent in such case is expressed therein.

I perceive no legal objection to the practice of the land department, as above. There are instances, dating as far back as 1838, of similar reservations inserted in patents issued under the pre-emption laws, where a part of the lands patented was found to be subject to rights claimed under other acts of Congress. (See Bryan *vs.* Forsyth, 19 How., 334; Meehan *vs.* Forsyth, 24 How., 175.) In the latter case the court remarks that the saving clause in these patents was designed to exonerate the United States from any claim of the patentee, in the event of his ouster by persons claiming under the acts referred to. This would be sufficient ground for the insertion of a reservation in patents for lode-claims, in cases where prior rights to the surface are found to exist in favor of townsites.

In the case under consideration a townsite entry in favor of the city of Tombstone was patented in September, 1880, the patent containing a proviso that no title shall be thereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining-claim or possession held under existing laws, (sec. 2392 Revised Statutes,) etc. Part of the Vizina mining-claim, which I understand to be a vein or lode-claim, and for which a patent is now sought to be obtained without a reservation, lies within the limits of the townsite so patented. Unless it should be established to the satisfaction of the land department that this claim existed and was possessed throughout its entire extent prior to the townsite location, and that the possessory right of the mineral claimant has since been continuously held and maintained in accordance with the mineral land laws, the fact that a patent has already been issued for such townsite, covering a part of such claim, must be deemed sufficient to warrant the insertion of a reservation (like that above described) in a subsequent patent for the claim.

The papers referred to me do not show that priority of right in favor of the mineral claim as against the townsite has been established; and my opinion is that they present no case calling for any special directions from the President to the land department, and the application in behalf of the mining company should be denied.

S. F. PHILLIPS,
*Acting Attorney-General.*

SURVEY ACCORDING TO LOCATION.

Application for a mining survey must be declined where the location was not properly marked and recorded. Bearings and distances must be given in a survey from the respective survey corners to the location corners, and the same must be shown on the plat.

*Commissioner McFarland to Surveyor-General Davis, Virginia City, Nevada, Jan.* 26, 1882.

Further proof as to the identity of the claim of Philip Dephanger *et al.* upon the Eagle lode as located and the same as surveyed is desired. The notice of location filed with the papers is regarded as insufficient to determine this satisfactorily. You will call upon the applicant to furnish a certificate of identity signed by any disinterested party. In this connection I desire to call your attention to the necessity of fur-

nishing for the benefit of this office more reliable information upon this point than the entry papers generally afford.

The act of Congress of May 10, 1872, expressly provides that "the location must be distinctly marked upon the ground so that its boundaries can be readily traced," and "that all records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

These provisions of the law must be strictly complied with in each case to entitle the claimant to a survey and patent, and therefore should a claimant under a location made *subsequent* to the passage of the act of May 10, 1872, *who has not complied with said requirements in regard to marking the location upon the ground and recording the same, apply for a survey, you will decline to make it.* (Circular of November 20, 1873, p. 58.)

If the Eagle lode was located in accordance with the requirements of the statute, it was marked upon the ground. If the survey was properly executed, it was made within the limits thus marked. There is, however, nothing in the entry or survey papers to show that this was done, save the bare statement that the survey was made in accordance with the notice of location; as the location notice is exceedingly blind, this statement can hardly be considered satisfactory.

To enable this office to determine satisfactorily, and at a glance, that the provisions of the law and its instructions are obeyed, you will in future require in the field-notes a particular reference to all the data upon which a survey is based, to wit, from each established corner of the survey a bearing and distance must be given to the corresponding corner of the location.

Upon the plat the lines of the location as found upon the ground must be laid down in such a manner as to contrast and show their relation to the lines of the survey.

If the location and survey are identical, the facts should be clearly and distinctly stated in the field-notes.

After a reasonable time has elapsed in which to notify your deputies of the foregoing, no survey not complying with these requirements will be allowed to go to patent.

### SURVEY OF ADVERSE CLAIM.

**When it is impossible to procure the survey of the adverse claim, the adverse claimant may show the nature, extent, and boundaries of his claim, as nearly as practicable from information in his reach, and present under oath the reasons for not following the official regulations. If the facts justifies such action, the regulations may be waived.**

*Secretary Kirkwood to Commissioner McFarland, Feb.* 21, 1882.

Mr. J. S. Wallace represents in effect that there are mines located high up in the Sawtooth mountains, in new districts near the headwaters of Wood river, in Idaho Territory, and that, in case parties should make applications for patents of such mines during the period from about December to April, it would be impossible, in a majority of instances, if not in all, for adverse claimants to procure surveys in ac-

cordance with present regulations within the period of publication, on account of the severity of the climate, deep snows, etc., in that locality.

In view of these facts, Mr. Wallace, who is acting as superintendent of mining property located in said mountains, suggests that the rights of all parties owning claims in the above-mentioned districts would be most effectually preserved and protected if the surveyor-general of the Territory were instructed to postpone the granting of any order for advertisement of applications for patents until the country is open in the spring, when adverse claimants can procure their surveys.

Mr. Wallace doubtless meant that the local land officers should be instructed to postpone publication of notices of applications for patents. But it is evident that under existing law such instruction would be improper.

You suggested that your office might issue instructions waiving the present requirements as to surveys of adverse claims, in cases in which the adverse claimants shall show under oath that such surveys cannot be executed and platted within the period of publication, on account of climatic or other temporary difficulties, and allowing adverse claimants to file such plats of surveys within a reasonable time after the obstacles to making surveys shall have been removed.

I do not agree with this suggestion. Adverse claimants should be held to reasonable diligence under the law in taking necessary steps to protect their interests. If there is danger or likelihood of applications for patents being presented during a season in which surveys cannot be made, the parties might anticipate such proceedings by securing surveys of their claims during the season in which no obstacles to making the same are present.

But, if application for patent in any case should be made at a time when it is impossible to secure a survey of the claim adverse thereto, then, as the law does not require impossibilities, the adverse claimant might show the nature, extent, and boundaries of his claim, as nearly as practicable from information within his reach, and present under oath his reasons for not following more clearly the regulations of your office, and submit whether, under all the circumstances, he had not properly presented an adverse claim. This would give opportunity to waive the regulation requirement in a given case when the facts were presented justifying such action, and would be preferable to a general waiver of the rule in anticipation of a case calling for any such waiver.

To waive the requirement as to surveys of adverse claims, in advance of the presentation of reasons therefor, would tend to encourage carelessness and indifference on the part of adverse claimants respecting such requirement, and would, I think, be equivalent to an invitation to adverse claimants to present excuses for laches, whereas they should exercise all reasonable diligence in their efforts to comply with the regulations.

### b. SALT SPRINGS AND DEPOSITS.

May be patented.

*Acting Commissioner Curtis to J. A. Rollins, Salt Lake City, Utah, April* 27, 1874.

You inquire whether salt springs can be patented under the mining acts of Congress.

The mining act of May 10, 1872, provides that lands containing "valuable mineral deposits" may be patented upon compliance with the terms of said act.

Where valuable mineral deposits are found in such quantity and quality as to render the land sought to be patented more valuable on this account than for purposes of agriculture, the tracts containing such valuable mineral deposits may be patented under said mining act.

If, however, the land does not contain *valuable mineral deposits* in quantity and quality sufficient to render the land more valuable on this account than for purposes of agriculture, it cannot be patented under said act, except in the case of mill-sites, which must be non-mineral in character.

If, as you state, you have the possession and the right of possession to said salt springs, and the deposit of salt renders the land more valuable on this account than for agricultural purposes, you can secure a patent therefor upon full compliance with the laws and instructions.

HALL *vs.* LITCHFIELD *et al.*

The policy of the government has been uniform since the inauguration of the public land system to reserve from sale salt springs and the adjacent land.

The proviso in the enabling act admitting Colorado as a State, relative to salt springs, "*Provided*, That no salt spring or lands, the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to an individual or individuals, shall by this act be granted to said State," refers to private claims protected by treaty stipulations.

In this case, there is no valuable deposit of salt shown to exist upon the tracts, which are only valuable on account of the salt springs. The filings and applications of all parties were accordingly rejected.

*Acting Commissioner Lippincott to Register and Receiver, Fairplay, Col., March* 2, 1876.

I have carefully examined the papers and testimony transmitted with your letter of the 1st October, 1875, in case of C. L. Hall *vs.* A. T. Litchfield *et al.*

The question presented is as to the true character of the described tracts.

The testimony submitted in the case is very voluminous and quite contradictory. The N. E. ¼ of N. E. ¼ of sec. 1, T. 13 S., R. 77 W., was returned by the surveyor-general as saline lands, and the evidence submitted fails to establish the incorrectness of this return.

The policy of the government has been uniform since the inauguration of the land system to reserve from sale salt springs.

The act of May 18, 1796, (1 Stat., 466,) requires every surveyor to note in his field-book the true situation of all mines, salt licks, and salt springs, and reserves for future disposition by the United States every salt spring which may be discovered, together with the section of one mile square which includes it.

The act of May 10, 1800, (Stat. 2, 73,) continued these reservations, and authorized sales to be made of the public lands by the register and receiver, excluding the sections reserved by the above-mentioned act.

The act of March 26, 1804, (Stat. 2, 277,) providing for the disposal of the public lands in the Indiana Territory, declares that "the several salt springs in the said territory, together with as many contiguous sections to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States."

It has been the policy of the government to reserve these salt springs and lands from sale, as is evidenced by the text of the different acts regulating the disposal of the public lands.

The act of April 30, 1802, (Stat. 2, 173,) admitting the State of Ohio, granted to the State certain salt springs.

The act of April 18, 1818, (Stat. 3, 429,) authorizing the admission of the State of Illinois, grants all the salt springs and the lands reserved for the use of the same to the State.

The act of March 6, 1820, (Stat. 3, 545,) authorizing the people of Missouri to form a State government and for the admission of the State, provides "that all salt springs, not exceeding twelve in number, with six sections of land adjoining to each, shall be granted to the said State, for the use of said State. * * * *Provided*, That no salt spring, the right whereof now is or hereafter shall be confirmed or adjudged to any individual or individuals, shall by this section be granted to the said State."

The same provision is made in the acts providing for the admission of the following-named States, as was provided in case of Missouri, viz:

Arkansas, Stat. 5, 58; Michigan, Stat. 5, 59; Florida, Stat. 5, 789; Iowa, Stat. 5, 789; Wisconsin, Stat. 9, 58; Minnesota, Stat. 11, 166; Oregon, Stat. 11, 383; Kansas, Stat. 11, 269; Nebraska, Stat. 13, 47.

The act approved March 3, 1875, (17 Stat., 474,) enabling the people of Colorado to form a State government, and for the admission of the State into the Union, has the same provisions in regard to salt springs as those contained in the Missouri act.

The Supreme Court of the United States, in the case of Morton *vs.* Nebraska, (21 Wall., 660,) construed the *proviso* in the grant to Nebraska of salt lands. This proviso reads the same in the Nebraska and Colorado acts, viz: "*Provided*, That no salt spring or lands, the right whereof is now vested in any indvidual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State."

The State of Nebraska is within the limits of the Louisiana purchase. That part of Colorado which embraces the salt springs in controversy lies within the boundaries of the territory ceded by Mexico to the United States. In said decision it was held that "the real purpose of the proviso is to be found in the situation of the country embraced in the Louisiana purchase. The treaty of Paris of April 30, 1803, by which the 'province of Louisiana' was acquired, stipulated for the protection of private property. * * * In this condition of things Congress thought proper in granting the salt springs to the State to say that no salt springs *the right whereof now is* or shall be confirmed or adjudged to any individual, shall pass under the grant to the State. Whether this legisla-

tion was necessary to save salt springs claimed under the French treaty, it is not important to determine; but manifestly it had this purpose in view, and nothing more. It could not refer to salt springs not thus claimed, because all entry upon them was unlawful on account of previous reservation. * * * This proviso can have little significance in the enabling act of Nebraska, or indeed in many other enabling acts, but Congress doubtless thought proper to introduce it out of the superabundance of caution; as there could be no certainty that in purchased or conquered territory, however remote from settlement, there might not be private claims protected by treaty stipulation to which it would be applicable. It cannot be invoked, however, for the protection of these plaintiffs. When a vested right is spoken of in a statute, it means a right lawfully vested, and this excludes the locations in question, for they were made on lands reserved from sale or entry."

The court also held that "the purpose Congress had in view is to be found in the unbroken line of policy in reference to saline reservations from 1796 to the date of this act. To perpetuate this policy and apply it equally to all the lands of the three Territories, (Kansas, Nebraska, and New Mexico,) was the controlling consideration for the incorporation of the section (4th section, July 22, 1854, 10 Stat., 308;) and although the words of the section are loose and general, their meaning is plain enough when taken in connection with the previous legislation on the subject of salines. It cannot be supposed, without an express declaration to that effect, that Congress intended to permit the sale of salines in Territories soon to be organized into States, and thus subvert a long-established policy, by which it had been governed in similar cases."

In the case under consideration it is not shown that any valuable deposit of salt is found upon the land in controversy, but said lands appear to be valuable only on account of said salt springs.

After a careful consideration of all the facts and the law in the case, I am clearly of the opinion that this office has no authority to dispose of said tracts either as agricultural or mineral lands, but that said salt springs, "with six sections adjoining and as contiguous as may be to each," should be reserved in order that the State of Colorado may be placed on an equal footing with other States in the matter of salt spring reservations.

The filings therefore made by C. L. Hall and by A. T. Litchfield *et al.*, are both rejected.

*Secretary Chandler to the Commissioner of the General Land Office, February* 13, 1877.

The reasons for your decisions are given at length, and are sufficient to justify the conclusions reached by you.

In addition to the reasons given, it may be proper to state that the spring in question is situated in that portion of Colorado included within the limits of the Louisiana purchase of 1803.

By the 10th section of the act of March 3, 1811, salt springs, and the lands contiguous thereto, were, by the direction of the President of the United States, to be reserved for future disposal of the States.

This policy of reservation has uniformly and consistently been applied by the government to said Territory, as well as the other territory of the United States.

The applicants are in no way protected by the proviso in section 11, of the act of March 3, 1875, providing for the admission of Colorado into the Union, viz: "That no salt spring or lands, the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State."

No vested rights could be obtained by any individuals under the laws for the disposal of the public lands. The rights to be protected were those recognized by treaty stipulations. (Morton *vs.* Nebraska, 21 Wall., 660.) (See part IV.)

EAGLE SALT WORKS.

Salt is a mineral, and lands containing valuable deposits of salt are excepted from the grant to the Central Pacific Railroad Company.

The act of January 12, 1877, providing for the sale of saline lands, is not applicable to lands in the State of Nevada.

*Commissioner Williamson to Register and Receiver, Carson City, Nevada, December* 12, 1877.

On the 21st of December, 1876, B. F. Leete and Charles H. Van Gorder filed in your office an application for patent for certain lands containing valuable deposits of salt, situated in Churchill county, Nevada, known as the Eagle Salt Works.

The notice was published in the Reno *Evening Gazette* on the 26th December, 1876, and for the full period of time thereafter required by law.

It appears that on the 25th January, 1877, the Central Pacific Railroad Company filed a protest against this application for patent, upon the ground that said premises are within the grant to said company; that said lands are not mineral lands, but lands containing salt, and that they are not exempted from the operations of the grant of lands to said company.

Section 3 of the act of Congress approved July 1, 1862, (12 Statutes, 489,) grants to said company every alternate section of public land within the limits of ten miles on each side of their road, "not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operations of this act."

This act was amended by act July 2, 1864, (13 Statutes, 356.)

The fourth section of said amendatory act provides that the term "mineral land," whenever the same occurs in this act and the act to which this is an amendment, shall not be construed to include "coal and iron land," and also provides that said grant shall not include mineral lands.

From the foregoing it will be seen that *mineral lands* do not pass to said railroad company by virtue of its grant.

Salt is a mineral, and lands containing valuable deposits of salt were, as *mineral lands*, excluded from the operations of said grant.

It has been the general policy of the government since the inauguration of the land system by the act of 18th May, 1796, to *reserve saline* lands from disposition under the laws regulating the disposal of the public lands.

Section 2329 of the Revised Statutes of the United States provides

for the patenting of claims, usually called placers, "including all forms of deposits, excepting veins of quartz or other rock in place;" and under this section of the Revised Statutes the land in question is alone subject to disposal.

The act of January 12, 1877, providing for the sale of saline lands, is not applicable to lands in the State of Nevada, as said act provides that the provisions of said laws shall not apply to any State or Territory which has not had a grant of salines by act of Congress, etc.

No grant of saline lands has been made to the State of Nevada.

It appears that the applicants base their title upon a location made by B. F. Leete and seven others. This location was made in accordance with the provisions of the act of the legislature of the State of Nevada, approved February 24, 1865, entitled "An act to provide for the location of lands containing salt."

In accordance with the requirements of said law a survey was made of the premises claimed, and the field-notes and a plat of such survey were recorded in the county recorder's office of Churchill county, Nevada.

The initial point of the location survey is "the summit of a little mountain, known as Eagle Butte, situated 94.40 chains east of C. P. R.R."

This survey embraced twelve hundred and forty acres of land.

The survey accompanying the application for patent embraces twelve hundred and eighty acres.

Whether this survey embraces any part or portion of the premises located by B. F. Leete *et al.* cannot be determined by an examination of the field-notes and plats of the two surveys, as no reference is made in the survey accompanying the application to the initial point of the location survey.

The courses and distances do not agree in the two surveys, and each survey embraces tracts which are not included in the other.

Under these circumstances a resurvey will be required before patent can issue for this claim.

This resurvey will be so made as to embrace that portion of the premises described in the application for patent which is included within the exterior boundaries of the premises located.

### *a.* COAL LANDS.

#### SCHOOL SECTIONS IN WYOMING.

*Commissioner Drummond to W. S. Foster, Rock Springs, Wyoming, July* 30, 1873.

I am in receipt of your letter of April 6, 1873, wherein inquiry is made as to "how the new coal law affects school sections." Your question is understood to be whether the sections designated sixteen and thirty-six in each township within the limits of Wyoming Territory, which are found to contain valuable deposits of coal, are reserved for school purposes, or can be sold as other coal lands, under the act of March 3, 1873.

Section 14 of the act approved July 25, 1868, providing for a temporary government for the Territory of Wyoming, makes no exception in

reserving sections sixteen and thirty-six for school purposes in each township, and this office is therefore without authority of law for disposing of school sections within Wyoming Territory, except in cases where, after the passage of the act of March 3, 1873, the parties are found in actual occupancy of the lands at the date of survey.

NON-CONTIGUOUS TRACTS—UNION PACIFIC RAILROAD.

*Commissioner Drummond to Register and Receiver, Cheyenne, Wyoming, August* 11, 1873.

Section 4 of said act [July 2, 1864, granting lands to the Union Pacific R.R. Co.] expressly provides that "the term 'mineral land,' wherever the same occurs in this act and the act to which this is an amendment, shall not be construed to include coal and iron land," thus plainly including such land in the grant to the company whenever found upon the odd sections granted.

There was no law then in force for the disposal of these lands, except by public offering under the act passed the day previous, and no rights have been acquired under that act or the subsequent act of March 3, 1865.

The road was definitely located as early as 1868, and it follows that the United States had no rights to confer upon claimants by the passage of the act of March 3, 1873.

While the law limits each individual to one entry, and prohibits the holding of any other lands by one who has in any manner participated in the one entry allowed, it is *not* provided that the tract or tracts entered shall be in *compact form*, the only restriction being that of quantity, bounded by legal lines of subdivision.

FORM OF DECLARATORY STATEMENT AND PROOF BY CORPORATIONS.

*Commissioner Drummond to Register and Receiver, Cheyenne, Wyoming, August* 14, 1873.

When an incorporated company desires to apply for a patent for coal land under the act of March 3, 1873, the form of the declaratory statement should be in terms as follows, viz:

The Wyoming Coal and Mining Company, a corporation consisting of four or more persons, organized under the general incorporation laws of the State of Nebraska, a copy of the certificate of incorporation being hereto attached, and having its principal office and place of business in Omaha, Nebraska, by its secretary and treasurer, Thomas Waddle, declares that, to the best of his knowledge and belief, each and every stockholder in said company is a citizen of the United States, or has declared his intention to become such; that no stockholder of said company, either as an individual or a member of any other association, incorporated or otherwise, has held or purchased any coal lands under the act approved March 3, 1873, entitled "An act to provide for the sale of lands of the United States containing coal;" and that it is the intention of said company to purchase, under the provisions of said act, the — quarter of section —, etc.

In case an incorporated company should file a D. S. under said act it will be necessary for the secretary of the company to file his affidavit, setting forth in full the names of all the stockholders at the date

of actual purchase. It will also be necessary for each stockholder to file an affidavit to the effect that he has never held or purchased any coal lands under the act approved March 3, 1873, entitled "An act to provide for the sale of the lands of the United States containing coal," either as an individual or as a member of an association. While the act of March 3, 1873, limits each individual to one entry, and prohibits the holding of any other coal lands by one who has in any manner participated in the one entry allowed, it is not provided that the tract or tracts entered shall be in compact form, the only restriction being that of quantity, bounded by legal lines of subdivision.

OREGON DONATION CLAIMS.

*Commissioner Drummond to John Yoakum, Empire City, Oregon, March* 28, 1874.

The act of 27th September, 1850, making donations to settlers in Oregon, expressly provides that "no mineral lands shall be located or granted under the provisions of this act."

In your letter you state that the land embraced by your claim is now "claimed as coal land." The first act of Congress regulating the disposal of coal lands was that of July 1, 1864. Previous to that time land containing coal was not held to be excluded from sale under the acts of Congress regulating the disposal of agricultural lands, and parties whose rights were initiated under said act of 27th September, 1850, will be permitted to receive patents for their claims upon full compliance with the law and instructions, although coal may have been discovered upon the tracts claimed by them.

TOWNSITES.

**Coal land cannot be included in a townsite entry. Hearings may be had to determine the character of land in conflict.**

*Acting Commissioner Curtis to Alma Elridge, Coalville, Utah, April* 21, 1874.

The townsite acts provide, among other things, that no title "shall be acquired to any valid mining-claim or possession held under the existing laws of Congress" by virtue of the provisions of said townsite acts. Where land has been returned as "coal land" by the surveyor-general, it cannot be entered as a townsite until a hearing has been held to determine the character of land, viz., whether it is mineral or agricultural in character. The coal land law provides for the sale of land by *legal subdivisions only*, and hence it will be necessary to present evidence in regard to *each forty-acre tract* in controversy.

ADJOINING LAND.

*Acting Commissioner Curtis to Hon. M. H. Dunnell, House of Representatives, May* 25, 1874.

Parties owning coal mines have no authority under the law to follow their vein or coal bed under the land adjoining. Where land is known to contain valuable deposits of coal, it cannot be entered under the preemption or homestead act.

SCHOOL SECTIONS IN CALIFORNIA.

*Commissioner Burdett to Register and Receiver, Shasta, California, November* 3, 1874.

The question is presented whether lands which are found upon survey to be designated as section sixteen or thirty-six pass to the State of California under the act of March 3, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," where the same contain valuable deposits of coal.

On the 23d April, 1873, the Hon. Secretary of the Interior, in case of the Keystone Consolidated Mining Company *et al. vs.* the State of California, decided "*that no mineral lands were granted by the act of* 1853."

It is true that the mining companies referred to in the Hon. Secretary's decision, above referred to, were claimants under the act of Congress, approved July 26, 1866, but the views therein expressed equally apply to claimants under the coal land law of March 3, 1873.

That lands containing valuable deposits of coal have been considered and treated as *mineral lands* is evident from the text of the act of July 1, 1864, entitled "An act for the disposal of coal lands and of town property in the public domain," viz: "That where any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and *which as mines* are excluded from the pre-emption act of eighteen hundred and forty-one, and which under past legislation are not liable to ordinary private entry," etc.

Your decision is therefore reversed, and you will allow said applicants to file upon and make entry of said tracts, upon full compliance with the law and instructions.

UNION PACIFIC RAILROAD COMPANY *vs.* CRISMON.

**Where rights had attached to coal lands prior to the definite location of this railroad past the same, said tracts were excluded from the grant to the railroad.**

*Commissioner Burdett to Register and Receiver, Salt Lake City, Utah, July* 26, 1875.

On the 9th of January, 1874, the township plat of township 2 N., range 5 E., was filed in your office.

On the 6th of March, 1874, George Crismon filed declaratory statement No. 15, claiming the south half of northeast quarter, and lots 1 and 2 of section 3, township 2 north, range 5 east, as coal land.

This land is within the limits of the withdrawal for the Union Pacific railroad.

On the twenty-first November you caused a hearing to be held.

The evidence submitted at the hearing shows that Henry B. Wild discovered coal upon this tract in June, 1864, and that Wild and R. J. Redden went into possession thereof, developing said coal-bed, and extracting coal therefrom; that they remained continuously in the possession of said land until the year 1869, when Redden conveyed his interest therein to Charles Crismon and sons in 1870, when H. B. Wild conveyed to Charles Crismon, Sr., and George Crismon his interest therein.

It also appears that Charles Crismon, Sr., and Nicholas Groesbeck conveyed their interest in said tract to George Crismon, November 21, 1874.

The evidence shows that said land has been in the actual possession and occupation of Wild, Redden, and their grantees since the date of the original discovery of coal therein, and that they have, during that time, expended more than twenty thousand dollars in developing said tract, and in extracting coal therefrom.

The Union Pacific railroad was definitely located past this land in June, 1868.

The question is presented whether said tracts enure to said railroad company by virtue of their grant.

Mineral lands are excluded from the grant to said company, but the fourth section of the act of July 2, 1864, provides that the term "mineral land" shall not be construed to include "coal and iron lands." Said section also provides that "any lands granted by this act or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim."

The act of third March, 1865, (13 Stat. 529,) provides "that in the case of any citizen of the United States who, at the passage of this act, may be in the business of *bona fide* actual coal mining on the public lands, * * * for purposes of commerce, such citizen, upon making proof satisfactory to the register and receiver to that effect, shall have the right to enter, according to legal subdivisions, a quantity of land, not exceeding one hundred and sixty acres, to embrace his improvements and mining premises."

This act also specifies when the declaratory statement shall be filed, to wit, in case of lands unsurveyed at the date of act, such declaratory statement shall be filed within three months from the return to the district office of the official township plat.

In the case under consideration rights had attached to said coal land under the act of third March, 1865, before the line of the road was definitely fixed past the land, and hence, by the terms of the act of July 2, 1864, said tracts were excluded from the grant to said company.

The right which Wild and Redden had acquired was subject to assignment, and, as hereinbefore stated, was assigned to Crismon.

DECLARATORY STATEMENT.

*Acting Commissioner Lippincott to Register and Receiver, Olympia, Washington, January* 21, 1876.

You will hereafter forward to this office, with coal-land entries, under section 2 of the act of March 3, 1873, (section 2348 of the Revised Statutes,) the original declaratory statements, retaining on your files copies thereof, if desired.

SCHOOL SECTIONS IN COLORADO.

*Commissioner Williamson to Register and Receiver, Denver, Colorado, March* 30, 1877.

The question is presented whether lands which fall within sections 16 and 36 pass to the State of Colorado under the act of Congress, approved March 3, 1875, (18 Stat., 474,) entitled "An act to enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States," where the same contain valuable deposits of coal.

The 7th section of said act provides "that sections numbered 16 and 36 in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other land equivalent thereto, in legal subdivisions of not more than one-quarter section, and as contiguous as may be, are hereby granted to said State for the support of common schools."

Section 15 of said act provides "that all mineral lands shall be excepted from the operation and grants of this act."

The words "*mineral land*," as they occur in the several acts regulating the disposal of the public domain, are used in contradistinction to the words "*agricultural land*."

That lands containing valuable deposits of coal have been considered and treated as *mineral lands* is evident from the text of the act of July 1, 1864, (13 Stat., 43,) entitled "An act for the disposal of coal lands and of town property in the public domain," viz: "That where any tracts embracing coal-beds or coal-fields constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption act of 1841, and which, under past legislation, are not liable to ordinary private entry," etc.

The Revised Statutes of the United States provide for the sale of coal lands under the general term "Mineral lands and mining resources." *Vide* title 32, chapter 6 R. S.

The Hon. Secretary of the Interior, on the 7th of May, 1875, affirmed the decision of this office in case of James P. Hogden *et al. vs.* The State of California, and held that mineral lands did not pass to the State of California under the act of 3d of March, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," (10 Stat., 244,) and that *coal lands are mineral lands.*

It is therefore held that sections 16 and 36 in the several townships do not pass to the State of Colorado under the act of 3d March, 1875, if the same contain valuable deposits of coal.

### CERTIFICATES OF DEPOSIT.

Certificates of deposit cannot be received in payment of coal lands.

*Secretary Schurz to Commissioner Williamson, Sept.* 22, 1877.

I have considered the case of Robert Sprowl, coal land applicant, on appeal from your decision of January 31, 1877, refusing to allow him to make part payment for the S. E. ¼ section 4, township 18 N., range 6 E., Olympia, Washington Territory, with certificates of deposit for the survey of said township.

You held that the certificates of deposit, authorized by section 2403 of the Revised Statutes, to go in part payment for the lands authorized to be surveyed by section 2401, were receivable for agricultural lands, but not for coal lands, because the last-named section says in express terms that *mineral* lands shall not be surveyed.

As coal lands have uniformily been treated by Congress and by this Department as mineral lands, I agree with your conclusion, that section 2401 does not authorize them to be surveyed, and, as a consequence, section 2403 does not authorize the certificates of deposit to be received in payment.

Your decision is affirmed.

ONE ENTRY BUT TWO OR MORE DECLARATORY STATEMENTS.

*Commissioner Williamson to Register and Receiver, Salt Lake City, Utah, October* 27, 1877.

In the case presented by you it appears that a coal D. S. was filed September 19, 1874, by J. E. Hutchings, upon certain tracts in T. 13 S., R. 5 E.; that Mr. Hutchings expended about six hundred dollars in tunnelling and prospecting said tracts, and found them worthless as coal lands; that he abandoned and relinquished his filing, and now desires to file upon other tracts, upon which he has expended five hundred dollars.

It will be observed that the law authorizes but *one entry* by the same person or association of persons, and prohibits parties who have had the *benefit* of the provisions of the statute from entering or holding other tracts.

In the case under consideration no entry has been made by Mr. Hutchings, and it cannot be said that he has had the benefit of the act. You will therefore permit him to make his second filing upon full compliance with law and instructions.

You will be governed hereafter by the instructions herein contained, in similar cases.

Where parties have made coal filings and have failed to make entries of the tracts therein described, within the time prescribed by law, they will be permitted to make entries thereof, provided no valid adverse rights shall have intervened, upon showing compliance with the other provisions of law.

M'KEAN *vs.* BUELL AND UNION PACIFIC RAILROAD CO.

**Coal is a mineral, and lands containing coal are mineral lands. Only one declaratory statement can be filed under the coal laws.**

*Secretary Schurz to Commissioner Williamson, January* 30, 1878.

I have considered the case of James B. McKean *vs.* David E. Buell and the Union Pacific Railroad Company, involving certain lands in township 2 north, range 5 east, Salt Lake City, Utah Territory, on appeal from your decision of April 9, 1877, adverse to the claims of McKean and the railroad company.

The township plat was filed in the local office on January 9, 1874.

John Spriggs filed coal D. S. No. 28, May 20, 1874, for the S. E. ¼ section 8, township 2 north, range 5 east.

Samuel H. Levan filed coal D. S. No. 86 on May 20, 1875, for the S. E. ¼ section 8, 2 N. 5 E., and on the 13th of May, 1876, assigned and conveyed the S. E. ¼ of S. E. ¼ of said tract to James B. McKean for the sum of four hundred dollars, and relinquished the balance to the United States.

On May 20, 1875, James H. Nounnan, as agent for David E. Buell, filed coal D. S. No. 87, for the E. ½ of S. E. ¼ sec. 8, N. E. ¼ of N. E. ¼ sec. 17, and S. W. ¼ of S. W. ¼ sec. 9, township 2 north, range 5 east.

A hearing to determine the rights of the parties was held before the local officers in July, 1876. The claim of the railroad company was rejected and the lands in contest awarded to the townsite of Coalville, by my predecessor's decision of February 10, 1877, and it is therefore unnecessary to consider the claims of the company in disposing of this

case. The townsite of Coalville was not represented at the hearing, and has asserted no claim to these coal mines. The testimony shows that the lands in dispute contain a valuable vein of coal from ten to twelve feet in thickness; that the same was discovered by John Spriggs in the year 1863; that Spriggs immediately took possession thereof, and expended several thousand dollars in developing said mines.

Spriggs sold an undivided half interest in said mines to D. E. Buell and I. C. Bateman in the year 1871, and said parties subsequently went into possession thereof, and have ever since remained in possession, either in person or by agent or tenant. They have expended between forty and fifty thousand dollars in developing said mines.

Neither Levan, who filed D. S. No. 86, nor his assignee, J. B. McKean, have ever been in possession of the S. E. ¼ of S. E. ¼ of said section 8. Mr. McKean admits that he has placed no improvements on said land, and does not know whether Levan improved the same or not.

You found that the testimony failed to establish the good faith of Levan or his assignee, McKean, and rejected said claim for that reason, and awarded the land to Buell, and Mr. McKean has appealed from your decision.

I concur in your conclusion that the claim of McKean is invalid, but not for the reasons assigned in your decision.

As Levan had never been in possession of the land or made any improvements thereon, he was only entitled to make an entry under section 2347 of the Revised Statutes.

The claimant under sec. 2347 must make the affidavit and application required by paragraph 26 of your instructions, before he can acquire any standing whatever, and as Levan made no such affidavit or application, it follows that he has never initiated any claim recognized by law. His filing was unauthorized and void at its inception and should be canceled on the records of your office. It is claimed that inasmuch as Spriggs, Buell, and Bateman are partners in said mine, their right to file for the land in contest was exhausted by the filing of D. S. No. 28 in the name of John Spriggs, and that D. S. No. 87, filed by David E. Buell, is consequently invalid.

Section 2350 prohibits more than one entry of coal lands, either by individuals or an association of persons, and requires preferred claimants to file their declaratory statements, and prove their respective rights and pay for their claims within the period prescribed by section 2349. This section was construed by your predecessor, Mr. Commissioner Drummond, to prohibit second filings, and regulations to that effect were issued by him on April 15, 1873, and are still in force. Inasmuch as interested parties could retain possession of valuable mines for an indefinite length of time without paying for the lands, by renewing their filings as fast as they expired, I am of opinion that this regulation was necessary in order to protect the interests of the government, and that it should be adhered to. As Buell, Bateman, and Spriggs have made valuable improvements on the land, and shown good faith, and as there is no adverse claim, and as the matter is between them and the government only, they will be allowed to amend D. S. No. 28, so as to embrace the land mentioned in D. S. No. 87 and the names of all the claimants thereto, and thereafter prove up and pay for the lands.

Your ruling that coal lands are mineral lands is affirmed, and in issuing a patent for the lands in question you will be governed by the decision of my predecessor of June 7, 1876, in the case of the townsite of Central City, Colorado.

TIMBER-CULTURE ENTRIES.

*Commissioner Williamson to Samuel Landers, Russell, Kansas, October* 14, 1878.

Coal lands are not subject to entry under the timber-culture laws, and on receipt of affidavit that such lands have been embraced in a timber-culture entry, steps will be taken to cancel the same.

EVERY KIND OF COAL IS CONTEMPLATED BY THE COAL ACT.

*Commissioner Williamson to Register and Receiver, Bismarck, Dakota, September* 25, 1880.

I am in receipt of register's letter of 6th inst., in which the question is asked: "Is lignite coal, and does the land containing the same, come within the provisions of the act of Congress approved March 3, 1873, entitled, 'An act to provide for the sale of lands of the United States containing coal?'"

Lignite is defined to be "mineral coal retaining the texture of the wood from which it was formed, and burning with an empyreumatic odor. It is of more recent origin than the anthracite bituminous coal of the proper coal series." (Webster's Dictionary.)

Furthermore, all of the known coal deposits west of the Missouri river are lignite, so far as I have been able to ascertain, and I think there can be no question but that the act relates to all lands containing any variety of coal whether anthracite, bituminous, lignite, or cannel.

WHAT DETERMINES THE PRICE OF COAL LANDS.

*Secretary Kirkwood to Commissioner McFarland, October* 17, 1881.

I have considered the question submitted for my consideration by your letter of September 29 ult., viz., the price government should charge for coal lands—whether $10 or $20 per acre—where the land is situated more than fifteen miles from any completed railroad at the time the claimant commenced opening and improving the mine, and at the date he filed his declaratory statement, but which is within fifteen miles of such road at the date of his application to purchase the land.

The answer rests upon a construction of sections 2347, 2348, 2349, and 2350 R. S.

These sections are a re-enactment of the act of March 3, 1873, which was not a part of the pre-emption system for the disposition of the public lands, but "An act to provide for the sale of lands of the United States containing coal." As an independent act, it must, therefore, be construed by itself, unaided by other acts, unless by analogy. It is not, in my opinion, difficult of interpretation.

The provision of section 2348 that persons named "shall be entitled to a preference right of entry, *under the preceding section*," means, I think, that they may enter the land upon the terms and conditions named in section 2347, which section fixes the price of the land. The preference right to enter a tract, and the actual entry thereof, are quite distinct in

their legal significance and effect; and when the statute gives "the right to enter a tract," upon payment of a certain price, it confines the entry to that price, and does not permit the entry to be controlled by conditions affecting the price, which may have existed when the preference right was secured—perhaps a year previously—and when the relation of the land to a completed railroad may have been quite different. The preference right has reference to a subsequent entry; but the price is to be determined at the date of entry, as if the party made private cash entry, and notwithstanding he may have secured a preference right; and is regulated by the relation of the land to the road at the date of proof of payment.

I am of the opinion, therefore, that the price of the land depends wholly upon its distance from a completed railroad at the date of entry, irrespective of the preferred right of entry, and that, if at the date of proof and payment, (which constitutes the entry,) the land is more than fifteen miles from such road, the price should be not less than ten dollars per acre; and that, if it is within fifteen miles, the price should be not less than twenty dollars per acre.

# PART IV.

# JUDICIAL DECISIONS.

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## *a.* IN FULL.

SUPREME COURT OF THE UNITED STATES.

**FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED) *vs.* TARBET.**

*Location—How laid.*—A location of a mining-claim upon a lode or vein of ore, should be laid along the same lengthwise of the course of its apex at or near the surface, as well under the mining act of 1866 as under that of 1872. If located otherwise, the location will only secure so much of the lode or vein as it actually covers.

*Dip—Side lines.*—Each locator is entitled to follow the dip of the lode or vein to an indefinite depth, though it carries him outside of the side lines of the location; but this right is based on the hypothesis that the side lines substantially correspond with the course of the lode or vein at the surface; and it is bounded at each end by the end lines of the location, crossing the lode or vein, and extended perpendicularly downwards, and indefinitely in their own direction.

*Crosswise location.*—A location laid crosswise of a lode or vein, so that its greatest length crosses the same instead of following the course thereof, will secure only so much of the vein as it actually crosses at the surface, and the side lines of the location will become the end lines thereof, for the purpose of defining the rights of the owners.

*Trespass.*—A locator working subterraneously into the dip of the vein belonging to another locator, who is in possession of his location, is a trespasser, and liable to an action for taking ore therefrom.

In error to the Supreme Court of the Territory of Utah.

Mr. Justice Bradley delivered the opinion of the court:

This is a writ of error to the supreme court of the Territory of Utah. This was an action in the nature of trespass *quare clausum fregit* brought in the district court of the Territory of Utah for the third district by Alexander Tarbet, and continued by his assignee, Helen Tarbet, the defendant in error, against the plaintiff in error and other persons. The action being dismissed as to the other persons, judgment was rendered upon the verdict of a jury against the plaintiff in error for $45,000 damages. The company carried the case to the supreme court of the Territory, where the judgment was affirmed on the 3d day of June, 1878. The controversy relates to the working of a mine in Little Cottonwood mining district, in the county of Salt Lake, Territory of Utah. The defendant in error claims to own and to have been in possession of a mining location on a lode called the Titus lode, the location including three claims and extending 600 feet westwardly from the discovery, with a width of 200 feet, and including ten feet on the east side of the discovery belonging to the South Star mine. The plaintiffs in error owned and had a patent for another mining location called the

Flagstaff mine, one hundred feet in width and 2,600 feet in length, running in a northerly and southerly direction, and crossing the Titus claims near the west end thereof, and nearly at right angles therewith. In working from the Flagstaff mine the plaintiffs in error worked around subterraneously, to a point some 300 feet to the east of their location, and on the north side of the Titus mine, and within about 100 feet of the Titus location. It is for this working that the suit was brought; and the principal question is, whether the plaintiffs in error had a right thus to work outside of their location on the east, and whether in doing so, they interfered with the rights of the defendant in error.

It is conceded that both parties are working on the same lode or vein of ore. The Flagstaff discovery, to which the location of the plaintiffs in error relates as its starting point, is situated nearly due west from that of the South Star and Titus, and about 550 feet therefrom. The lode crops out at the two points of discovery, but is not visible at intermediate points. These croppings, however, show that the direction or course of the apex of the vein, at or near the surface, is nearly east and west. The location of the Titus, claimed by the defendant in error, nearly corresponds with this surface course of the vein. The location of the Flagstaff, belonging to the plaintiffs in error, crosses it nearly at right angles.

The principal difficulty in the case arises from the fact that the surface is not level, but rises up a mountain in going from the Titus discovery to the Flagstaff. The dip of the vein being northeasterly, it happens that by following a level beneath the surface the strike of the vein runs in a northwesterly direction, or about north 50° west. In other words, if by a process of abrasion the mountain could be ground down to a plain, the strike of the vein would be northwest instead of west, as it now is on the surface; or, at least, as the evidence tended to show that it is. In that case the location of the defendant in error would leave the vein to its right, and the location of the plaintiffs in error would not reach it until several hundred feet to the north of the Flagstaff discovery,

Evidence being given pro and con in reference to the condition and situation of the vein, both at and below the surface, and to the workings thereon by both parties, the judge charged the jury as follows:

"If you find that Alexander Tarbet during the time mentioned in the complaint, to wit, from January 1, 1873, to December 14, 1875, (being a period of 2 years 11 months and 14 days,) was in possession of the whole or an undivided interest of Nos. 1, 2, and 3 of the Titus mining-claim, and ten feet of No. 1 of the South Star mining-claim, holding the same in accordance with the mining laws and the customs of the miners of the mining-district, and that the apex and course of the vein in dispute is within such surface; then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein on the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary, and extends beneath other and adjoining lands, and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of

the surface line, on its dip, is limited in two ways; by the length of the course of the vein within the surface; and, by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again—

"The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title, or color of title, to any of the surface of the South Star and Titus mining-claim, except to so much of No. 3 as lies within the patented surface of the Flagstaff mining-claim.

The court refused to give the following instructions, propounded by the plaintiffs in error, to wit:

"By the act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed; the lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode; the patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim; it was his convenience for working the lode that controlled his location of the surface area; and the patentee under that act takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Secondly—

"In the very nature of the thing, a lode or vein in its unworked and undeveloped stage cannot be known and surveyed so as to plat it and make a diagram of it; the law does not require impossibilities, and must receive a reasonable construction. The diagram required to be filed by the applicant for a patent under the act of 1866 was a diagram of the surface area claimed, and this diagram might be extended laterally, and otherwise, as convenience in working this claim might suggest to the applicant."

These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining-claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction.

The plaintiffs in error have made the following assignment of error, which indicates the position which they contend for:

"The plaintiff in error assigns for error the charge of the court and the refusal to give its request; that is, that the judge instructed the jury that the defendant below had shown no title or color of title to any part of the vein except so much of its length on its course as lies within the surface-ground patented; and that he refused to direct the jury, that by the act of Congress it was the vein or lode of mineral that was located and claimed, and that the patent granted the lode, irrespective of the surface area, which was merely for the convenience of working the lode; that the diagram required to be filed by an applicant for a patent was of the surface claimed, and might be extended laterally or otherwise, as convenience in working the claim might suggest; that the surface-ground patented does not measure the grantee's right to the vein

or lode in its course, or control the direction which he shall take; and, lastly, that the Flagstaff company have the right to the lode for the length thereof claimed in the location notice, though it runs in a different direction from that in which it was supposed to run at the time of the location."

Both parties agree in the general rule that the owner of a mining right in a lode or vein cannot follow the course of the vein beyond the end lines of his location extended perpendicularly downwards; but that he may follow the dip to an indefinite distance outside of his side lines. This is undoubtedly the general rule of miners' law, and the true construction of the act of Congress. The language of the act of 1866 (14 Stat., 251) in relation to "vein or lode" is, "that no location hereafter made shall exceed two hundred feet in length *along the vein* for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to *any depth*, with *all its dips, variations, and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules," etc. The act of 1872 is more explicit in its terms, but the intent is undoubtedly the same as it respects end lines and side lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

The location of the plaintiffs in error is thus laid across the Titus lode, that is to say, across the course of its apex, at or near the surface; and the side lines of their location are really the end lines of their claim, considering the direction or course of the lode at the surface.

As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim properly so called, which lines are those which are crosswise of the general course of the vein on the surface. The Spanish mining law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. (See Rockwell, pp. 56–58; and see same book, pp. 274, 275.) But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to

any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it.

The plaintiff in error contended, and requested the court to charge, in effect, that having received a patent for 2,600 feet in length and 100 feet in breadth, commencing at the Flagstaff discovery, on the lode, at the surface, they were entitled to 2,600 feet of that lode along its length, although it diverged from the location of their claim, and went off in another direction. We cannot think that this is the intent of the law. It would lead to inextricable confusion. Other locations correctly laid upon the lode, and coming up to that of the plaintiff in error on either side, would, by such a rule, be subverted and swept away. Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein; but if it should make a material departure from his location, and run off in a different direction, and not return to it, it certainly could not be said that the location was on that lode or vein farther than it continued substantially to correspond with it. Of what use would a location be, for any purpose of defining the rights of parties, if it could be thus made to cover a lode or vein which runs entirely away from it? Though it should happen that the locator, by sinking shafts to a considerable depth, might strike the same vein on its subterranean descent, he ought not to interfere with those who, having properly located along the vein, are pursuing their right to follow the dip in a regular way. So far as he can work upon it, and not interfere with their right, he might probably do so; but no farther. And this consequence would follow irrespective of the priority of the locations. It would depend on the question as to what part of the vein the respective locations properly cover and appropriate.

We do not mean to say that a vein must necessarily crop out upon the surface, in order that locations may be properly laid upon it. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein, and locations may be properly made on the surface above it, so as to secure a right to the vein beneath. But where the vein does crop out along the surface, or is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration, we think that the act of Congress requires that this course should be substantially followed in laying claims and locations upon it. Perhaps the law is not so perfect in this regard as it might be; perhaps the true course of a vein should correspond with its strike, or the line of a level run through it; but this can rarely be ascertained until considerable work has been done, and after claims and locations have become fixed. The most practicable rule is to regard the course of the vein as that which is indicated by surface outcrop or surface explorations and workings. It is on this line that claims will naturally be laid, whatever be the character of the surface, whether level or inclined.

If these views are correct, the Titus claims belonging to the defendant in error were located along the vein or lode in question in a proper manner, and the Flagstaff claims, belonging to the plaintiffs in error,

were located across it, and can only give the latter a right to so much of the vein or lode as is included between their side lines. The court below took substantially this view of the subject, and ruled accordingly.

As this is really the whole controversy in the case, it is unnecessary to examine more minutely the different points of the charge, or the instructions asked for by the plaintiffs in error. The question was presented in different forms, but all to the same general purport.

The judgment of the court below is affirmed. (8 Otto, 463.)

## UNITED STATES CIRCUIT COURT, DISTRICT OF NEVADA.

### EUREKA CONSOLIDATED MINING COMPANY *vs.* RICHMOND MINING COMPANY OF NEVADA.

*Vein and lode defined.*—The terms "vein" and "lode," as used by miners and in the mining acts of Congress, are applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

*Objections to patent to mining claim—When made.*—Under the mining acts of Congress, where one is seeking a patent for his mining location, and gives the prescribed notice, any other claimant of an unpatented location objecting to the patent on account of extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will be afterward precluded from objecting to the issue of the patent.

*Doctrine of relation not applicable to mining patent.*—The doctrine of "relation" cannot be applied so as to cut off the rights of the earlier patentee under a later location.

*Same—Silence of first locator a waiver.*—The silence of the first locator, when a subsequent locator applies for a patent, is, under the statute, a waiver of his priority.

*Provision as to parallel lines directory.*—The provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction.

*End lines to mining claim implied in act of* 1866.—"End lines" are not named in the act of 1866, but they are necessarily implied in it. By allowing a certain number of feet on a ledge, the mining law meant that a locator might follow his vein for that distance on the course of a ledge, and to any depth within that distance.

*Presumptions as to official duties.*—The presumption of law is, that the officers charged with the supervision of applications for mining patents, do their duty. If, under any circumstances, a patent for a mining location, issued after the passage of the act of 1872, may be valid without the parallelism of lines required by that act, the law will presume that such circumstances existed.

*Lode may be followed on dip, not on vein beyond end of claim.*—The patents allowed by these acts do not authorize the patentee to follow the vein outside of the end lines of the claim vertically drawn down through the lode; but authorize him to follow his veins with its dips, angles, and variations to any depth; though it may enter the land lying on the side of the claim. Lines drawn down vertically through the ledge or lode, at right angles with a line representing the course at the ends of the claimant's line of location, will carve out a section of the ledge or lode within which he is permitted to work, and out of which he cannot pass.

*Mining acts of* 1866 *and* 1872 *construed*—The act of 1866 allowed so many linear feet of the particular lode located and surface-ground for the convenient working thereof. The act of 1872 granted certain surface-ground and the particular lode located, and all other lodes the top or apex of which lies within the surface lines, subject to the limitation that in following the lodes to any depth the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of his location. The act of 1872 in terms annexes this condition to the possession not only of claims subsequently located, but to the possession of those previously located.

*Agreement construed—Dividing line follows dip.*—In the case of lode-claims, a dividing line between them fixed by agreement, upon the surface at a given point,

**or for a given distance, must be extended along the dip of the lode, so far as that goes, and must necessarily divide all that the location on the surface carries, or it will not constitute a boundary between the claims.** (5 Sawyer, 121.)

This is an action for the possession of certain mining ground, particularly described in the complaint, situated in Eureka mining district, in the county of Eureka, in the State of Nevada. The plaintiff is a corporation created under the laws of California, and the defendant, the Richmond Mining Company, is a corporation created under the laws of Nevada. The other defendants, Thomas Wren and Joseph Potts, are citizens of the latter State. The action was originally commenced in a State court of Nevada, but upon application of the plaintiff, and upon the ground of its incorporation in another State, and the presumed citizenship, from that fact, of its corporators or stockholders in that State, it was transferred to the circuit court of the United States. The complaint in the State court, in addition to the usual allegations of a declaration in ejectment, set forth various grounds upon which was based a prayer for an order restraining the defendants from working the premises in controversy pending the action. The defendants, in their answer to the complaint, not only denied the title of the plaintiff, but made various averments upon which a like restraining order against the plaintiff was asked. Both orders were granted. This union of a demand in ejectment for the property in controversy, with a prayer for provisional equitable relief, is permitted by the system of procedure which obtains in the State, thus saving the parties the necessity of litigating in two suits what can as readily and less expensively be accomplished in one. But this union is not permitted in the Federal courts; and upon the transfer of the present action, the pleadings of the plaintiff were amended by substituting a regular complaint in ejectment on the law side of the court, and a bill was filed for an injunction on its equity side. The defendants answered both, and also filed a cross-bill for an injunction against the plaintiff.

By arrangement of the parties, the defendants, Messrs. Wren and Potts, are dropped out of the controversy, and their names may be stricken from the pleadings. The claim for damages is also waived in this action, without prejudice to any future proceedings with respect to them. By stipulation, the case at law—the action of ejectment—is tried by the court without the intervention of a jury, and the judges sit at San Francisco, instead of Carson, their finding and judgment to be entered in term time in the latter place, as though the case were heard and decided there. The testimony taken in the action at law is to be received as depositions in the equity suit, and both cases are to be disposed of at the same time, to the end that the whole controversy between the parties may be settled at once.

The premises in controversy are of great value, amounting by estimation to several hundred thousands of dollars, and the case has been prepared for trial with a care proportionate to this estimate of the value of the property; and the trial has been conducted by counsel on both sides with eminent ability.

Whatever could inform, instruct, or enlighten the court has been presented by them. Practical miners have given us their testimony as to the location and working of the mine. Men of science have ex-

plained to us how it was probable that nature in her processes had deposited the mineral where it is found. Models of glass have made the hill, where the mining ground lies, transparent, so that we have been able to trace the course of the veins, and see the chambers of ore found in its depths. For myself, after a somewhat extended judicial experience, covering now a period of nearly twenty years, I can say that I have seldom, if ever, seen a case involving the consideration of so many and varied particulars, more thoroughly prepared or more ably presented. And what has added a charm to the whole trial has been the conduct of counsel on both sides, who have appeared to assist each other in the development of the facts of the case, and have furnished an illustration of the truth that the highest courtesy is consistent with the most earnest contention.

The mining ground which forms the subject of controversy is situated in a hill known as Ruby Hill, a spur of Prospect Mountain, distant about two miles from the town of Eureka, in Nevada. Prospect Mountain is several miles in length, running in a northerly and southerly course. Adjoining its northerly end is this spur called Ruby Hill, which extends thence westerly, or in a southwesterly direction. Along and through this hill, for a distance slightly exceeding a mile, is a zone of limestone in which, at different places throughout its length, and in various forms, mineral is found, this mineral appearing sometimes in a series or succession of ore bodies more or less closely connected, sometimes in apparently isolated chambers, and at other times in what would seem to be scattered grains. And our principal inquiry is to ascertain the character of this zone, in order to determine whether it is to be treated as constituting one lode, or as embracing several lodes, as that term is used in the acts of Congress of 1866 and 1872, under which the parties have acquired whatever rights they possess. In this inquiry, the first thing to be settled is the meaning of the term in those acts. This meaning being settled, the physical characteristics and the distinguishing features of the zone will be considered.

Those acts give no definition of the term. They use it always in connection with the term vein. The act of 1866 provided for the acquisition of a patent by any person or association of persons claiming "a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper." The act of 1872 speaks of veins or lodes of quartz or other rock in place, bearing similar metals or ores. Any definition of the term should therefore be sufficiently broad to embrace deposits of the several metals or ores here mentioned. In the construction of statutes, general terms must receive that interpretation which will include all the instances enumerated as comprehended by them. The definition of a lode given by geologists is that of a fissure in the earth's crust filled with mineral matter, or more acurately, as aggregation of mineral matter containing ores in fissures. (See Von Cotta's Treatise on Ore Deposits, Prime's Translation, 26.) But miners used the term before geologists attempted to give it a definition. One of the witnesses in this case, Dr. Raymond, who for many years was in the service of the General Government as commissioner of mining statistics, and in that capacity had occasion to examine and report upon a large number of mines in the States of Nevada and California, and the Terri-

tories of Utah and Colorado, says that he has been accustomed, as a mining engineer, to attach very little importance to those cases of classification of deposits which simply involve the referring of the subject back to verbal definitions in the books. The whole subject of the classification of mineral deposits he states to be one in which the interests of the miner have entirely overridden the reasonings of the chemists and geologists. "The miners," to use his language, "made the definition first. As used by miners, before being defined by any authority, the term lode simply meant that formation by which the miner could be led or guided. It is an alteration of the verb lead; and whatever the miner could follow, expecting to find ore, was his lode. Some formation within which he could find ore, and out of which he could not expect to find ore was his lode." The term lode star, guiding star, or north star, he adds, is of the same origin. Cinnabar is not found in any fissure of the earth's crust, or in any lode as defined by geologists; yet the acts of Congress speak, as already seen, of lodes of quartz, or rock in place, bearing cinnabar. Any definition of lode as there used, which did not embrace deposits of cinnabar, would be as defective as if it did not embrace deposits of gold or silver. The definition must apply to deposits of all the metals named, if it apply to a deposit of any one of them. Those acts were not drawn by geologists or for geologists; they were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose. The use of the terms vein and lode, in connection with each other in the act of 1866, and their use in connection with the term ledge in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose.

It is difficult to give any definition of the term as understood and used in the acts of Congress which will not be subject to criticism. A fissure in the earth's crust—an opening in its rocks and strata made by some force of nature, in which the mineral is deposited—would seem to be essential to the definition of a lode in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it would equally constitute in his eyes a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying with boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes.

Examining, now, with this definition in mind, the features of the zone which separate and distinguish it from the surrounding country, we experience little difficulty in determining its character. We find that it is contained within clearly defined limits, and that it bears un-

mistakable marks of originating, in all its parts, under the influence of the same creative forces. It is bounded on the south side, for its whole length, at least so far as explorations have been made, by a wall of quartzite of several hundred feet in thickness; and on its north side, for a like extent, by a belt of clay, or shale, ranging in thickness from less than an inch to seventy or eighty feet. At the east end of the zone, in the Jackson mine, the quartzite and shale approach so closely as to be serated by a bare seam, less than an inch in width. From that point they diverge, until on the surface in the Eureka mine they are about 500 feet apart, and on the surface in the Richmond mine about 800 feet. The quartzite has a general dip to the north, at an angle of about 45 degrees, subject to some local variations, as the course changes. The clay or shale is more perpendicular, having a dip at an angle of about 80 degrees. At some depth under the surface these two boundaries of the limestone, descending at their respective angles, may come together. In some of the levels worked they are now only from two to three hundred feet apart.

The limestone found between these two limits—the wall of quartzite and the seam of clay or shale—has, at some period of the world's history, been subjected to some dynamic force of nature, by which it has been broken up, crushed, disintegrated, and fissured in all directions, so as to destroy, except in places of a few feet each, so far as explorations show, all traces of stratification; thus specially fitting it, according to the testimony of the men of science to whom we have listened, for the reception of the mineral which, in ages past, came up from the depths below in solution, and was deposited in it. Evidence that the whole mass of limestone has been, at some period, lifted up and moved along the quartzite, is found in the marks of attrition engraved on the rock. This broken, crushed, and fissured condition prevades, to a greater or less extent, the whole body, showing that the same forces which operated upon a part, operated upon the whole, and at the same time. Wherever the quartzite is exposed the marks of attrition appear. Below the quartzite no one has penetrated. Above the shale the rock has not been thus broken and crushed. Stratification exists there. If in some isolated places there is found evidence of disturbance, that disturbance has not been sufficient to affect the stratification. The broken, crushed, and fissured condition of the limestone gives it a specific, individual character, by which it can be identified and separated from all other limestone in the vicinity.

In this zone of limestone numerous caves or chambers are found, further distinguishing it from the neighboring rock. The limestone being broken and crushed up as stated, the water from above readily penetrated into it, and operating as a solvent, formed these caves and chambers. No similar cavities are found in the rock beyond the shale, its hard and unbroken character not permitting, or at least opposing, such action from the water above.

Oxide of iron is also found in numerous places, throughout the zone, giving to the miner assurance that the metal he seeks is in its vicinity.

This broken, crushed and fissured condition of the limestone, the presence of the oxides of iron, the caves or chambers we have mentioned, with the wall of quartzite and seam of clay bounding it, give to

the zone, in the eyes of the practical miner, an individuality, a oneness, as complete as that which the most perfect lode in a geological sense ever possessed. Each of the characteristics named, though produced at a different period from the others, was undoubtedly caused by the same forces, operating at the same time, upon the whole body of the limestone.

Throughout this zone of limestone, as we have already stated, mineral is found in the numerous fissures of the rock. According to the opinions of all the scientific men who have been examined, this mineral was brought up in solution from the depths of the earth below, and would therefore naturally be very irregularly deposited in the fissures of the crushed matter, as these fissures are in every variety of form and size, and would also find its way in minute particles in the loose material of the rock. The evidence shows that it is sufficiently diffused to justify giving to the limestone the general designation of mineralized matter—metal-bearing rock. The three scientific experts produced by the plaintiff, Mr. Keyes, Mr. Raymond, and Mr. Hunt, all of them of large experience and extensive attainments, and two of them of national reputation, have given it as their opinion, after examining the ground, that the zone of limestone between the quartzite and the shale constitutues one vein or lode, in the sense in which those terms are used by miners. Mr. Keyes, who for years was superintendent of the mine of the plaintiff, concludes a minute discription of the character and developments of the ground, by stating that in his judgment, according to the customs of miners in this country and common sense, the whole of that space should be considered and accepted as a lead, lode, or ledge of metal-bearing rock in place.

Dr. Raymond, after giving a like extended account of the character of the ground, and his opinion as to the causes of its formation, and stating with great minuteness the observations he had made, concludes by announcing as his judgment, after carefully weighing all that he had seen, that the deposit between the quartzite and the shale is to be considered as a single vein in the sense in which the word is used by miners—that is, as a single ore deposit of identical origin, age, and character throughout.

Dr. Hunt, after stating the result of his examination of the ground and his theory as to the formation of the mine, give his judgment as follows:

"My conclusion is this, that this whole mass of rock is impregnated with ore; that although the great mass of ore stretches for a long distance above horizontally and along an incline down the foot-wall, as I have traced it, from this deposit you can also trace the ore into a succession of great cavities or bonanzas lying irregularly across the limestone, and into smaller caverns or chasms of the same sort; and that the whole mass of the limestone is irregularly impregnated with the ore. I use the word impregnated in the sense that it has penetrated here and there; little patches and stains, ore-vugs and caverns and spaces of all sizes and all shapes, irregularly disseminated through the mass. I conclude therefore that this great mass of ore is, in the proper sense of the word, a great lode, or a great vein, in the sense in which the word is used by miners; and that practically the only way of utilizing this de-

posit is to treat the whole of it as one great ore-bearing lode or mass of rock."

This conclusion as to the zone constituting one lode of rock-bearing metal, it is true, is not adopted by the men of science produced as witnesses by the defendant, the Richmond company. These latter gentlemen, like the others, have had a large experience in the examination of mines, and some of them have acquired a national reputation for their scientific attainments. No one questions their learning or ability, or the sincerity with which they have expressed their convictions. They agree with the plaintiff's witnesses as to the existence of the mineralized zone of limestone with an underlying quartzite and an overlying shale; as to the broken and crushed condition of the limestone, and substantially as to the origin of the metal and its deposition in the rock. In nearly all other respects they disagree. In their judgment, the zone of limestone has no features of a lode. It has no continuous fissure, says Mr. King, to mark it as a lode. A lode, he adds, must have a foot-wall and a hanging-wall, and if it is broad, these must connect at both ends, and must connect downwards. Here there is no hanging-wall or foot-wall; the limestone only rests as a matter of stratigraphical fact on underlying quartzite, and the shale overlies it. And distinguishing the structure at Ruby Hill from the Comstock lode, the same witness says that the one is a series of sedimentary beds laid down in the ocean and turned up; the other is a fissure extending between two rocks.

The other witnesses of the defendant, so far as they have expressed any opinion as to what constitutes a lode, have agreed with the views of Mr. King. It is impossible not to perceive that these gentlemen at all times carried in their minds the scientific definition of the term as given by geologists—that a lode is a fissure in the earth's crust filled with mineral matter—and disregarded the broader, though less scientific definition of the miner, who applies the term to all zones or belts of metal-bearing rock lying within clearly-marked boundaries. For the reasons already stated, we are of the opinion that the acts of Congress use the term in the sense in which miners understand it.

If the scientific definition of a lode, as given by geologists, could be accepted as the only proper one in this case, the theory of distinct veins existing in distinct fissures of the limestone, would be not only plausible, but reasonable; for that definition is not met by the conditions in which the Eureka mineralized zone appears. But as that definition cannot be accepted, and the zone presents the case of a lode as that term is understood by miners, the theory of separate veins, as distinct and disconnected bodies of ore, falls to the ground. It is, therefore, of little consequence what name is given to the bodies of ore in the limestone; whether they be called pipe veins, rake veins or pipes of ore, or receive the new designation suggested by one of the witnesses, they are but parts of one greater deposit, which permeates, in a greater or less degree, with occasional intervening spaces of barren rock, the whole mass of limestone, from the Jackson mine to the Richmond, inclusive.

The acts of Congress of 1866 and 1872 dealt with a practical necessity of miners; they were passed to protect locations on veins or lodes, as miners understood those terms. Instances without number exist where the meaning of words in a statute has been enlarged or restricted, and qualified to carry out the intention of the legislature.

The inquiry, where any uncertainty exists, always is as to what the legislature intended, and when that is ascertained it controls. In a recent case before the Supreme Court of the United States, singing birds were held not to be live animals within the meaning of a revenue act of Congress. (Reiche *vs.* Smythe, 13 Wall., 162.) And in a previous case, arising upon the construction of the Oregon donation act of Congress, the term, a single man, was held to include in its meaning an unmarried woman. (Silver *vs.* Ladd, 7 Wall., 319.) If any one will examine the two decisions, reported as they are in Wallace's Reports, he will find good reasons for both of them.

Our judgment being that the limestone zone in Ruby Hill, in Eureka district, lying between the quartzite and the shale, constitutes, within the meaning of the acts of Congress, one lode of rock-bearing metal, we proceed to consider the rights conveyed to the parties by their respective patents from the United States. All these patents are founded upon previous locations, taken up and improved according to the customs and rules of miners in the district. Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. If the date of such location be stated in the instrument, or appear from the record of its entry in the local land-office, the patent will take effect by relation as of that date, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee, by virtue of his earlier location, has been lost by a failure to contest the claim of the intervening claimant, as provided in the act of 1872. As in the system established for the alienation of the public lands, the patent is the consummation of a series of acts, having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants to the same property. As was said by the Supreme Court in the case of Sheply *vs.* Cowan, (1 Otto, 338,) where two parties are contending for the same property, the first in time, in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be the first in right.

But this principle has been qualified in its application to patents of mining ground by provisions in the act of 1872, for the settlement of adverse claims before the issue of the patent. Under that act, when one is seeking a patent for his mining location, and gives proper notice of the fact as there prescribed, any other claimant of an unpatented location objecting to the patent of the claim, either on account of its extent or form, or because of asserted prior location, must come forward with his objections and present them, or he will afterwards be precluded from objecting to the issue of the patent. While, therefore, the general doctrine of relation applies to mining patents so as to cut off intervening claimants, if any there can be, deriving title from other sources, such perhaps as might arise from a subsequent location of school warrants or a subsequent purchase from the State, as in the case of Heydenfeldt *vs.* Daney Gold Mining Company, reported in the third of Otto, the doctrine cannot be applied so as to cut off the rights of the earlier patentee, under a later location, where no opposition to that loca-

tion was made under the statute. The silence of the first locator is, under the statute, a waiver of his priority.

But from the view we take of the rights of the parties under their respective patents, and the locations upon which those patents were issued, the question of priority of location is of no practical consequence in the case.

The plaintiff is the patentee of several locations on the Ruby Hill lode, but for the purpose of this action it is only necessary to refer to three of them—the patents for the Champion, the At Last, and the Lupita or Margaret claims. The first of these patents was issued in 1872, the second in 1876, and the third in 1877. Within the end lines of the locations, as patented in all these cases, when drawn down vertically through the lode, the property in controversy falls. Objection is taken to the validity of the last two patents, because the end lines of the surface locations patented are not parallel, as required by the act of 1872. But to this objection there are several obvious answers. In the first place it does not appear upon what locations the patents were issued. They may have been, and probably were, issued upon locations made under the act of 1866, where such parallelism in the end lines of the surface locations was not required. The presumption of the law is, that the officers of the executive department specially charged with the supervision of applications for mining patents, and the issue of such patents, did their duty, and in an action of ejectment mere surmises to the contrary will not be listened to. If under any possible circumstances a patent for a location without such parallelism may be valid, the law will presume that such circumstances existed. A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency it is iron-clad against all mere speculative inferences. In the second place, the provision of the statute of 1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction. Its object is to secure parallel end lines drawn vertically down, and that was effected in these cases by taking the extreme points of the respective locations on the length of the lode. In the third place, the defect alleged does not concern the defendant, and no one but the government has the right to complain.

The defendant, the Richmond Mining Company, also holds several patents issued to it upon different locations; but in this case it specially relies upon the patents of the Richmond and Tip Top claims. It is alleged that these patents were issued upon locations made earlier than any upon which the patents to the plaintiff were issued. Assuming this to be the fact, and claiming from it that the patents, by relation back to such locators, antedate in their operation the patents of the plaintiff, and the further fact that the locations were made under the act of 1866, the defendant relies upon the facts assumed to defeat the pretensions of the plaintiff. It contends that inasmuch as the croppings of the vein it works are within the surface of its patented locations, it can follow the vein wherever it leads, though it be outside of the end lines of the locations when vertically drawn down through the lode. Its position is that whenever under the law of 1866, a location was made on a lode or vein,

a right was acquired to follow the vein wherever it might lead, without regard to the end lines of the location.

This position is urged with great persistence by one of the counsel of the defendant, and with the ability which characterizes all his discussions.

The second section of the act of 1866, upon the provisions of which this position is based, provides: "That whenever any person, or association of persons, claims a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to local customs or rules of miners in the district where the same is situated, and having expended, in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land-office a diagram of the same, so extended, laterally or otherwise, as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It will be seen by this section that to entitle a party to a patent his claim must have been occupied and improved according to the local customs or rules of miners of the district, and that his diagram of the same filed in the land-office in its extension, laterally or otherwise, must be in conformity with them.

The rules of the miners in the Eureka mining district, adopted in 1865—laws of the district, as they are termed by the miners—provided that claims of mining ground should be made by posting a written notice on the claimant's ledge, defining its boundaries if possible; that each claim should consist of two hundred feet on the ledge, but claimants might consolidate their claims by locating in a common name, if in the aggregate no more ground was claimed than two hundred feet for each name, and that each locator should be entitled to all the dips, spurs, and angles connecting with his ledge; and that a record of all claims should be made within ten days from the date of location. The rules also allowed claimants to hold one hundred feet each side of their ledge for mining and building purposes, but declared that they should not be entitled to any other ledge within this surface.

It will be perceived by these rules that they had reference entirely to locations of claims on ledges. It would seem that the miners of the district then supposed that the mineral in the district was only found in veins or ledges, and not in isolated deposits. In February, 1869, new rules were added to those previously passed, authorizing the location of such deposits. These new rules provided that each deposit claim should consist of one hundred feet square, and that the location should take all the mineral within the ground to any depth.

Under these rules square locations and linear locations were made by parties through whom the defendant derives title on what is called the Richmond ledge, and linear locations were made on what is called the Tip Top ledge, with surface locations for mining purposes, both parties claiming with their locations all dips, spurs, and angles. It is only of

the linear locations we have occasion to speak; it is under them that the defendant asserts title to the premises in controversy.

Now as neither the rules of miners in Eureka mining district, nor the act of 1866, in terms, speak of end lines to locations made on ledges, nor in terms impose any limitation upon miners following these veins wherever they may lead, it is contended that no such limitation can be considered as having existed and be enforced against the defendant. The act of 1866, it is said, recognizes the right of the locator to follow his vein outside of any end lines drawn vertically down, when it permits him to obtain a patent granting his mine, "together with the right to follow such vein or lode with its dips, angles, and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition."

It is true that end lines are not in terms named in the rules of the miners, but they are necessarily implied, and no reasonable construction can be given to them without such implication. What the miners meant by allowing a certain number of feet on a ledge was that each locator might follow his vein for that distance on the course of the ledge, and to any depth within that distance. So much of the ledge he was permitted to hold as lay within vertical planes drawn down through the end lines of his location, and could be measured anywhere by the feet on the surface. If this were not so, he might by the bend of his vein hold under the surface along the course of the ledge double and treble the amount he could take on the surface. Indeed, instead of being limited by the number of feet prescribed by the rules, he might in some cases oust all his neighbors and take the whole ledge. No construction is permissible which would substantially defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules.

Similar rules have been adopted in numerous mining-districts, and the construction thus given has been uniformly and everywhere followed. We are confident that no other construction has ever been adopted in any mining-district in California or Nevada. And the construction is one which the law would require in the absence of any construction by miners. If, for instance, the State were to-day to deed a block in the city of San Francisco to twenty persons, each to take twenty feet front, in a certain specified succession, each would have assigned to him by the law a section parallel with that of his neighbor of twenty feet in width cut through the block. No other mode of division would carry out the grant.

The act of 1866 in no respect enlarges the right of the claimant beyond that which the rules of the mining-district gave him. The patent which the act allows him to obtain does not authorize him to go outside of the end lines of his claim, drawn down vertically through the ledge or lode. It only authorizes him to follow his vein, with its dips, angles, and variations to any depth, although it may enter land adjoining, that is, land lying beyond the area included within his surface lines. It is land lying on the side of the claim, not on the ends of it, which may be entered. The land on the ends is reserved for other claimants to explore. It is true, as stated by the defendant, that the surface land taken up in connection with a linear location on the ledge

or lode is, under the act of 1866, intended solely for the convenient working of the mine, and does not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles, and variations of the vein, or control the direction he shall take. But the line of location taken does measure the extent of the miner's right. That must be along the general course, or strike, as it is termed, of the ledge or lode. Lines drawn vertically down through the ledge or lode at right angles, with a line representing this general course, at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge or lode, within which he is permitted to work, and out of which he cannot pass.

As the act of 1866 requires the applicant for a patent to file in the local office a diagram of his claim, such diagram must necessarily present something more than the mere linear location. It is intended that it should embrace the surface claimed for the working of the mine. In this way each of the patents of the parties embraces one or more acres and the fraction of an acre of surface-ground, and some hundred linear feet on the lode.

The act of 1872 preserves to the miner the rights acquired under the act of 1866, and confers upon him additional rights. Under the act of 1866 he could only hold one lode or vein, although more than one appeared within the lines of his surface location. The surface-ground was allowed him for the convenient working of the lode or vein located, and for no other purpose; it conferred no right to any other lode or vein. But the act of 1872 alters the law in this respect; it grants to him the exclusive right of possession to a quantity of surface-ground not exceeding a specified amount, and not only to the particular lode or vein located, but to all other veins, lodes, and ledges, the top or apex of which lies within the surface lines of his location, with the right to follow such veins, lodes, or ledges to any depth. But these additional rights are granted subject to the limitation that in following the veins, lodes, or ledges the miner shall be confined to such portions thereof as lie between vertical planes drawn downward through the end-lines of his location, and a further limitation upon his right in cases where two or more veins intersect or cross each other. The act in terms annexes these conditions to the possession, not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the act of 1866, indicates that, in the opinion of the legislature, no change was made in the rights of previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule, applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines.

Our opinion, therefore, is that both the defendant and the plaintiff, by virtue of their respective patents, whether issued upon locations under the act of 1866, or under the act of 1872, were limited to veins or lodes lying within planes drawn vertically downward through the end lines of their respective locations; and that each took the ores found within those planes at any depth in all veins or lodes, the apex or top of which lay within the surface lines of its locations.

The question of priority of location is, therefore, as already stated, of no practical importance in the case. This question can only be important where the lines of one patent overlap those of another patent. Here neither plaintiff nor defendant could pass outside of the end lines of its own locations, whether they were made before or after those upon which the other party relies. And inasmuch as the ground in dispute lies within planes drawn vertically downward through the end lines of the plaintiff's patented locations, our conclusion is that the ground is the property of the plaintiff, and that judgment must be for its possession in its favor.

The same conclusion would be reached if we looked only to the agreement of the parties made on the 16th of June, 1873. At that time the plaintiff owned the patented claim called the Lookout claim, adjoining on the north the Richmond claim. The defendant had worked down from an incline in the Richmond and Tip Top into the ore under the surface lines of the Lookout patent. The plaintiff thereupon brought an action for the recovery of the ground and the ores taken from it. A compromise and settlement followed, which are contained in an agreement of that date, and were carried out by an exchange of deeds. A map or plat was made, showing the different claims held by the two parties. A line was drawn upon this map, on one side of which lay the Champion, the At Last, and the Margaret claims, and on the other side lay the Richmond and the Lookout claims. By the agreement of the parties, the plaintiff on the one hand was to convey to the defendant the Lookout ground, and also all the mining ground lying on the northwesterly side of the line designated, with the ores, precious metals, veins, lodes, ledges, deposits, dips, spurs, or angles, on, in, or under the same, and to dismiss all pending actions against the defendant; and on the other hand, the defendant was to pay to the plaintiff the sum of $85,000, and to convey with warranty against its own acts, all its right, title, or interest in and to all the mining ground situated in the Eureka mining district, on the southeasterly side of the designated line, and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs, or angles, on, in, or under the same—"it being," says the agreement, "the object and intention of the said parties hereto to confine the workings of the party of the second part (the Richmond Mining Company) to the northwesterly side of the said line continued downward to the centre of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

The deeds executed between the parties the same day were in accordance with this agreement. The deed of the Richmond Mining Company to the plaintiff conveyed all the mining ground lying on the southeasterly side of the designated line, "together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed."

The line thus designated, extended down in a direct line along the dip of the lode, would cut the Potts chamber, and give the ground in dispute to the plaintiff. That it must be so extended, necessarily follows from the character of some of the claims it divides. As the Rich-

mond and the Champion were vein or lode-claims, a line dividing them must be extended along the dip of the vein or lode, so far as that goes, or it will not constitute a boundary between them. All lines dividing claims upon veins or lodes necessarily divide all that the location on the surface carries, and would not serve as a boundary between them if such were not the case. The plaintiff would therefore be the owner of the ground in dispute by the deed of the defendant, even if it could not assert such ownership solely upon its patented locations. Our finding therefore is for the plaintiff, and judgment must be entered thereon in its favor for the possession of the premises in controversy.

FIELD, *Presiding Justice.*
SAWYER, *Circuit Judge.*
HILLYER, *District Judge.*

## SUPREME COURT OF THE UNITED STATES.

### RICHMOND MINING COMPANY OF NEVADA *vs.* EUREKA CONSOLIDATED MINING COMPANY.

*Compromise line.*—A compromise agreement between two mining companies, by which a certain line was established which neither could cross, is construed to mean that the line must extend through the property to the centre of the earth in a plane, and not merely through the surface.

In error to the circuit court of the United States for the district of Nevada.

Mr. Chief Justice Waite delivered the opinion of the court.

This is a suit of ejectment brought by the Eureka company against the Richmond, to recover the possession of a valuable mining property. The facts appearing in the findings, which, in our opinion, are decisive of the case, may be stated as follows:

In Ruby Hill, a spur of Prospect Mountain, in the Eureka mining district, Nevada, is a zone of limestone, running in a northwesterly and southeasterly direction for a distance of a little more than a mile. Underlying this zone, on the southerly side, is a well defined, unbroken, foot-wall of quartzite, several hundred feet thick, and with a dip to the northward of about forty-five degrees. On the northerly side is an overhanging wall or belt of shale, also well defined and generally unbroken, which dips at an angle of about eighty degrees, and varies in thickness from less than an inch to seventy or eighty feet. At the easterly end of the zone these walls of quartzite and shale approach so closely as to be separated only by a seam less than an inch in thickness. From this point they diverge until on the surface, at the Eureka mine, they are about five hundred feet apart, and at the Richmond about eight hundred. At some depth below the surface they must come together, if they continue to descend on the same angle; and, on some of the levels that have been worked, they are already found to be only from two to three hundred feet apart. This zone of limestone, at some time since its original deposit, has been broken, fissured, and disintegrated in all directions, so as to destroy, except in a few places of a few feet each, all traces of stratification. In this way its original structure and character became totally changed, and it was fitted to receive the extensive mineral deposits which are found in the numerous fissures, caverns, and cavities, and in the loose material of the rock, in various forms. Sometimes the mineral appears in a series or succession of ore-bodies,

more or less closely connected; sometimes in apparently isolated chambers and again in small bodies and in scattered grains. Although barren limestone intervenes, the mineral is so generally diffused throughout the zone as to render the whole mineralized matter metal-bearing rock. Bodies of ore appear in croppings on the surface at various points throughout the whole length of the zone, along which mining-claims have been located. No mineral has been found either in the quartzite or the shale, and no considerable indications of any have been discovered within a mile north or south of the limestone.

In 1864 the miners of the district adopted a system of laws and regulations for their government. At that time provisions were made for ledge locations only, and in February, 1869, it was found necessary to add some amendments to meet the requirements of the district. This was done by a resolution, which contained a preamble, as follows:

"Whereas, explorations have made it evident that the mineral in Eureka district is found more frequently in the form of deposits than in fissure-veins or ledges, and the laws of the district do not provide for the location of such deposits; and whereas, the deficiency in the law may give rise to expensive litigation, * * * the miners of Eureka district have adopted the following amendments to the old laws of the district."

The amendments were to the effect that deposit claims might be located; that a deposit claim should consist of a piece of ground one hundred feet square, and be designated as a "square;" that under certain circumstances such claims might be united; and that the owner should be entitled to all the mineral within his "ground to an indefinite depth."

On the 29th of May, 1869, after this amendment of the miners' laws, there was filed for record in the mining records of the district a "square" location of the Lookout claim, being 400 feet northerly and southerly, and 200 feet easterly and westerly, that is to say, "one hundred feet on each side of the hill monuments for the centre, and * * * on the north end of Ruby Hill." On the 20th of September, 1869, notice of a ledge-claim, called the Tip Top, was filed for record in the same records; and on the same day, by other parties, another claim, the Richmond, for "seven locations of one hundred feet square," and seven locations of two hundred feet each, on the Richmond ledge, more particularly described "as located and situated adjoining the Champion claim on the south, and running north from said Champion, and adjoining the claim known as the Tip Top ledge." Both the Tip Top and Richmond claims included "all dips, spurs, and angles." The Tip Top covered six hundred feet on the ledge and one hundred feet on each side. The Lookout adjoined the Richmond on the north.

The Eureka company, at some time before April 26, 1871, but at what precise date does not appear, became the owner of the Champion, Nuget, At Last, and Margaret claims. The Champion, At Last, and Margaret adjoined the Richmond and Lookout on the west. The Nuget adjoined the Champion, but its westerly line did not extend to the Richmond as originally located. The At Last adjoined the Champion, and the Margaret the At Last. The Nuget extended to and across the line between the zone of limestone and the quartzite; and the distance across the

four claims from the Nuget, on its southerly side, to the Margaret, on its northerly side, is seven hundred feet. It was not found in terms by the court below whether these claims extended the entire distance across the zone between the quartzite and the shale; but as it was found that the width of the zone, at the Eureka mine, was five hundred feet, and at the Richmond eight hundred, the fair inference is that the four claims belonging to the Eureka covered substantially the entire surface of the limestone between the end lines of the Champion extended.

On the 26th of April, 1871, the Eureka company conveyed to the Richmond a triangular piece of ground in the southwesterly corner of the Champion claim, described by metes and bounds, and in the deed the following provision was made:

"But it is expressly understood and agreed that this deed does not convey or quit-claim or release any ores, precious metals, veins, lodes, or deposits, dips, spurs, or angles not embraced within the above-mentioned boundaries, and that the party of the second part [Richmond company] agrees and covenants, for itself, its successors and assigns, to make no claim hereafter to any ground or ore or metals therein embraced within the Nuget, Champion, Lookout, At Last, Margaret, and other mining-claims and locations now owned and possessed by the party of the first part, [Eureka company,] except as to that contained within the limits of the above-described triangular piece of ground."

The Richmond company, in working its mine on the Richmond location, and in following the vein which cropped out on that location, got under the surface of the Lookout, which was then owned by the Eureka company. Controversies arose between the two companies as to their rights under their respective claims, which resulted, on the 16th of June, 1873, in a compromise, by which a dividing line was established, and the Eureka company agreed to convey to the Richmond all the mining-ground and claim lying on the northwesterly side of this line, including the Lookout claim, and all veins, lodes, etc., and not to protest against any application by the Richmond company for a patent for the Richmond or other claims, provided such applications did not cross the line which was fixed. The Richmond company agreed to convey to the Eureka, with warranty against its own acts, all its rights, title, and interest in and to the mining-ground situated on the southeasterly side of the line and in and to all ores, precious metals, veins, lodes, ledges, deposits, dips, spurs, or angles, on, in, or under the land or mining-ground, or any part thereof. Then follows in the agreement this clause:

"It being the object and intention of the said parties hereto to confine the workings of the said party of the second part [Richmond company] to the northwesterly side of the said line continued downward to the centre of the earth, which line is hereby agreed upon as the permanent boundary line between the claims of the said parties."

The line thus established was described as follows: "Commencing on the northeasterly corner of the Margaret mining-ground or claim, * * * running thence in a southeasterly direction along the edge of said Margaret ground, the At Last ground, and the Champion ground to a point marked W. on the map; thence southerly along the edge of said Champion ground to the northeasterly corner of the Nuget ground, and thence along the edge of the Nuget ground to the northwesterly corner

thereof." The point W. was at the beginning of the triangular piece of ground conveyed by the Eureka to the Richmond in 1871, and from there to the Nuget ground the line was the boundary between that triangle and the Champion.

Deeds were executed to perfect the conveyances contemplated by this agreement, and on the 30th of April, 1874, the Richmond company got a patent for its Richmond claim as surveyed, "embracing a portion of the unsurveyed public domain, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of five hundred and one and one-half (501½) lineal feet of the said Richmond vein, lode, ledge, or deposit for the length hereinbefore described throughout its entire depth, although it may enter the land adjoining; and also of all other veins, lodes, ledges, or deposits throughout their entire depths, the tops or apexes of which lie inside the exterior boundary lines of said survey at the surface, extended downward vertically, although such veins, lodes, ledges, or deposits in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said survey: *Provided*, That the right of possession hereby granted to such outside parts of said veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits."

Before this time, on the 16th of July, 1872, the Eureka company got a similar patent for the Champion claim; and afterwards, on the 12th of December, 1876, for the At Last and the Nuget. This suit was begun on the 27th of March, 1877, and on the 30th of the same month the Eureka obtained a similar patent for the Margaret.

The Richmond company is also the owner of the Arctic and Utah claims, the first filed for record October 4, 1876, and the last January 7, 1877.

The particular mining ground in dispute is situated within the zone of limestone which has been described, and within planes drawn vertically down through the end lines of the Champion claim as patented to the Eureka company, and within planes drawn vertically down through the extreme points of the patented locations of the At Last and the Margaret claims, at right angles to the course or strike of the zone, and produced so as to follow its dip. The top or apex of the zone is within the surface lines of the patents to the Eureka company, and the zone dips at right angles to its course, and on such a dip extends under the surface of the Arctic and Utah claims. The property also lies on the southeasterly side of the compromise line agreed on in the settlement of June 16, 1873, extended vertically downward so as to follow the dip of the zone. The end lines of the surveys of the At Last and Margaret claims, as patented, are not parallel with each other.

Upon these facts, we have had no difficulty in reaching the conclusion that the judgment of the court below, sustaining the title of the Eureka company, was right. To our minds there cannot be a doubt that the compromise line was intended to fix permanently the boundary between the mining properties of the two companies at that point. The Rich-

mond was to confine its workings to the north and west of the line, and the Eureka to the south and east. The Eureka had already got its patent for the Champion claim, which must have been older than the Richmond, for the Richmond location was bounded on the Champion, and, by this patent, was permitted to follow throughout their entire depth all veins, lodes, ledges, and deposits, the tops, or apexes of which came to the surface within the lines of its survey. It is evident, also, that the Richmond company was seeking a similar patent for its Richmond claim, as by the terms of the settlement the Eureka was to withdraw its opposition; and, in due time, such a patent was obtained. The Eureka company also pushed forward its applications for patents to its other claims, and, in the end, got them all in the same form, and with grants of the same privileges. In this way, the companies secured from the United States the right to work the entire metal-bearing rock, from the quartzite to the shale, between the end lines of their patented surveys extended downwards, and following the dip of the mineralized limestone zone. Their patents are all alike, and their rights under them the same, save only that the Eureka is confined in its operations to the southeasterly side, and the Richmond to the northwesterly side, of the agreed line.

In establishing this line it is to be presumed that the parties had in view the peculiar character of the property about which they had been contending. They were settling, as between themselves, their rights to mining property, and for the purpose of carrying on mining operations in that locality. They must have known perfectly well, from the observations they had already made, that but a small part of the immense mineral deposit in that zone would probably be found between the exposed surface of the limestone and the quartzite immediately underneath. What they wanted was to fix as between themselves their rights in following what is called in the findings "the zone of metamorphosed limestone," so as to reach the anticipated deposits in the depths below. A compromise which only settled their controversies as to what was directly under the surface would not have accomplished this. The Richmond wanted to be relieved from all embarrassments in getting under the Lookout, and it is to be presumed the Eureka wanted similar privileges under the surface for the Champion and its other claims. For this purpose the parties had to secure the necessary grants from the United States; and the fair inference from what was done is that the Eureka was not to be interfered with in getting what it could on the south and east of the line, and the Richmond was to have the same privilege on the north and west.

The language used is to be construed with reference to the peculiar property about which the parties were contracting. Whether the limestone was or was not, within the meaning of the acts of Congress and the understanding of miners, a single vein, lode, or ledge, it was all mineralized or metal-bearing rock, as distinguished from the barren walls in which it was enclosed. It descended into the earth on an angle, and unless parties in working it could follow its course as it went down, they could not avail themselves to the full extent of the wealth it contained. When, therefore, we find parties contending about their rights to its possession, and finally agreeing on a line of division between them-

selves which shall be continued downwards towards the centre of the earth, the conclusion is irresistible that the line was to be extended downwards through the property in its course towards the centre of the earth. Anything less than this would make their settlement a mere temporary expedient to get rid of a present difficulty, and leave their most important rights as much in dispute as ever. Such, we cannot believe, was the understanding.

This disposes of the case. The Richmond company is in no condition to dispute the validity of the Eureka's patents for the At Last and the Margaret, because the end lines of the surveys are not parallel, as it has agreed with Eureka, for a consideration, not to work in the limestone to the south and east of the compromise line. Upon the face of the patents the United States have granted to the Eureka the right to all veins, lodes, and deposits, the tops or apexes of which lie on the inside of its surveys as patented, throughout their entire depth, and wherever they may go, provided it keeps itself within the end lines of the surveys. The finding that the ground in dispute is within the end lines, and that the apex is within the surface lines, settles the rights of the parties between themselves, as well under their patents as under their compromise agreement.

The judgment of the circuit court is affirmed.

## UNITED STATES CIRCUIT COURT, DISTRICT OF CALIFORNIA.

### NORTH NOONDAY MINING COMPANY *vs.* ORIENT MINING COMPANY.

*Only citizens can locate mining-claims.*—Under the act of Congress of May 10, 1872, relating to the public mineral lands, none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to such lands by location.

*How naturalized, and mode of proof.*—A foreign-born son of an alien may become a citizen by being naturalized, or by the naturalization of his father, during his minority; but whether he or his father was so naturalized or not, is a question of fact for the jury; and as tending to prove that fact, the affidavit of the party himself is under the statute competent evidence for all purposes of said act of May 10, 1872.

*Power of miners to limit width of lode-claims.*—By implication, the act of May 10, 1872, confers upon the miners the right to limit the width of a lode-claim to 25 feet on each side of the middle of the vein.

*Miners' rules must be in force.*—But to be of any validity, a rule or custom of miners must not only be established or enacted, but must be *in force* at the time and place of the location. It does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiesence of the miners. It is void whenever it falls into disuse, or is generally disregarded.

*Question of fact.*—It is a question of fact for the jury whether or not a mining law or custom is in force; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved; and parol evidence is admissible to show whether the rule or custom is in force or not.

*Definition of vein or lode.*—A vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz or some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin or many feet thick, or irregular in thickness; and it may be rich or poor at the point of discovery, provided it contains any of the metals named in the statute.

*Discovery of a vein.*—No rights can be acquired under the statute, by location, before the discovery of a vein or lode within the limits of the claim located.

*Discovery of vein after location.*—But a location is made valid by the discovery of a

vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same claim by other persons.

*Other veins than those discovered.*—Where a valid location is made upon a vein or lode discovered the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downwards, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines.

*How location to be marked.*—A location of a mining-claim must be distinctly marked on the ground so that its *boundaries* can be readily traced, but the law does not define or describe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed by stakes, mounds, and written notices, whereby the *boundaries* can be readily traced, is sufficient. If the centre line of a location of a lode-claim, lengthwise, be marked by a prominent stake or monument at each end thereof, upon one of which is placed a written notice showing that the locator claims the length of said line upon the lode, from stake to stake, and a specified number of feet in width on each side of said line, such location is so marked that the boundaries may be readily traced; and so far as the marking of the location is concerned is a sufficient compliance with the law.

*Right of subsequent locator to object.*—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location or before recording; provided, that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim.

*As to record of a mining-claim.*—Where a rule or custom of miners, in force, requires a location to be recorded, such recording is necessary; otherwise not. To make a valid record it must contain the names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument as will identify the claim, but such natural objects or permanent monuments, are not required to be on the ground located, although they may be, and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If, by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular; otherwise not.

*Work necessary to hold a claim.*—The statute requires one hundred dollars' worth of work on each claim located after May 10, 1872, in each year, and in default thereof authorizes the claim to be re-located by other parties, provided the first locator has not resumed work upon it; but if the first locator resumes work at any time after the expiration of the year, and before any re-location is made, he thereby preserves his right to the claim; and no other person has any right to re-locate it after such resumption of work, in good faith, by the first locator, even though the latter had failed to perform any work for the period of one year, or more, immediately before he resumed work.

*As to location and sale by an alien.*—If, in the attempt by an alien to locate a claim, he performs all the acts necessary to a valid location by a citizen, and then conveys such claim to a citizen, who takes possession and continues to perform all the conditions required by law to hold such claim, such citizen thereby acquires and holds a valid title to the claim so located by the alien, as against all persons having acquired no right therein before such conveyance by the alien.

*Joint locations by citizens and aliens.*—If a citizen and an alien jointly locate a claim not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title.

*Corporation when deemed a citizen.*—A corporation organized and existing under the laws of California is to be deemed a citizen in the sense of the act of Congress of May 10, 1872.

*What is actual possession.*—A person who has purchased a mining-claim which had been properly located and marked out on the ground, and who is personally, or by agents, upon the claim, working and developing it, and keeping up the bound-

**ary stakes and marks thereof, is not merely in the constructive possession of such claim, by virtue of mining laws, but is in the actual possesion of the whole claim. Such possession is a *possessio pedis*, extending to the boundary lines of the claim.**

This was an action in the nature of an action of trespass upon a lode mining-claim, in the Bodie mining district, California, in which the defendant pleaded title to the *locus in quo.*

The following is the charge to the jury by Judge Sawyer:

By an act of Congress, which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as applicable and not inconsistent with the laws of the United States.

In order to acquire any right of location and purchase under this act a party seeking to acquire such right must either be a citizen of the United States, or must have declared his intention to become such. If, therefore, Smith, or any other locator under whom plaintiff claims, was not a citizen, or had not declared his intention to become such at the time of making his location, he acquired no right under the act by virtue of such location. And whether Smith, or any other of such locators, was at the time of his location a citizen, or had declared his intention to become such, is a question of fact for you to determine from the evidence. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and none others, are citizens of the United States. A person born in a foreign country, out of the jurisdiction of the United States, whose father is not a citizen of the United States, can only become a citizen by naturalization. The foreign-born son becomes a citizen by being himself naturalized, or by the naturalization of his father during the minority of the son. If, therefore, Smith was alien born, it was necessary that he should be naturalized, or that his father should be naturalized during his minority, in order to make him a citizen. The statute, for the purpose of acquiring a mining location, makes the affidavit of the party himself competent evidence of his naturalization. It is for you to determine the sufficiency of the evidence to establish the fact.

All the locations under which plaintiff claims were made since May 10, 1872; and at the time they were respectively made the statute authorized a claim to be 1,500 feet in length along the vein or lode, and it was provided that "no claim shall extend more than 300 feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom *in force* at the time of the location, at the place where it is made, the location may extend to the distance of 300 feet on each side of the middle of the vein at the surface; that is to say, the claim may be 1,500 feet in length along the vein, by 600 feet wide, including 300 feet on each side of the middle of the vein.

As I construe the statute, however, and so instruct you, by implica-

tion, the miners by a rule, regulation, or custom, established and *in force* at the time and place of the location, may limit the width of the claim to 25 feet on each side of the middle of the vein at the surface. But such limitation to 25 feet on each side, to be valid, must be by virtue of a rule, regulation, or custom, which has not only been established, but which is actually *in force* at the time of the location. The regulation must be in accordance, and not in conflict, with the laws of the United States and of the State of California; and the laws of California provide that "in actions respecting mining-claims, proof must be admitted of the customs, usages, or regulations, established and *in force* at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action." This provision is still in force, except so far as its operation is limited by the act of Congress.

One of the locations under which plaintiff claims was made November 10, 1875, and the claim was re-located December 15, 1876, each time 300 feet wide on each side of the lode; the notice in terms purporting to locate it under the act of Congress allowing such location.

It is claimed by the defendant that there was, at the time of the location and re-location, a regulation in force in that district, limiting the claim to 50 feet on each side of the vein, and that the location of 300 feet is therefore void. Now, whether there was or not such a regulation or custom *in force* at the time, is a question of fact to be found by the jury, from all of the evidence in the case on that point.

The defendant, to show a regulation limiting the location to 50 feet on each side, introduced the minutes of proceedings of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation and minutes of meetings held at various times subsequently, amending the rules, but continuing this rule in force down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had till December 30, 1876, which is after said location and re-location and nine years after any meeting amending said rules. At said meeting of December 30, 1876, the miners declined to adopt "the United States mining laws;" and no action upon the subject of rules is shown to have been since had by any miners' meeting.

The plaintiff, to meet this testimony, introduced the mining records of the district, from which it appears that from and including the year 1872, when the act of Congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district, there being none in 1872, one in 1873, in which no width was specified, and none in the year 1874; that during the year 1875 eleven quartz locations were made, of which nine were made 300 feet wide on each side of the lode, and purported to have been made in pursuance of said act of Congress, and two only of fifty feet wide on each side, one of which two was marked on the record as abandoned; and during the year 1876 twenty-five locations appear to have been made, of which five were 300 feet wide on each side of the vein; one an extension of a six hundred feet claim having no width mentioned, and the others 50 feet wide on each side, four of which being after the re-location by Lockberg. From this it is argued by plaintiff that quartz mining in the district was

practically abandoned for several years, and no laws on the subject were practically in force; that on the return of the miners and the revival of mining in 1875 the act of Congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims 300 feet wide on each side, and in practice adopted and generally acquiesced in that rule—the rule limiting the claims to 50 feet by common consent, falling into disuse and ceasing to be in force. As held by the supreme court of California, in commenting upon the provision of the State statute cited, "no distinction is made by the State statute between a 'custom' or 'usage,' the proof of which must rest in parol, and a 'regulation' which may be adopted by a miners' meeting and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse or is generally disregarded. It must not only be *established*, but *in force*.

"A custom reasonable in itself and generally observed will prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time." It is for you, then, gentlemen of the jury, to determine whether this limitation to 50 feet was actually *in force* at the time the two locations, 300 feet wide on each side were made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time, and being once in force, a presumption would arise that it continued in force till something appears tending to show that it had been repealed, or had fallen into disuse and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether in view of there being few locations in this district during several years, and none in some, and of the passage of the act of Congress referred to, and the location, at first, after the revival of the mining interest in 1875, of most all claims, in pursuance of the provisions of the act, 300 feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the 50-feet limitation had fallen into disuse, or was really *in force* at the date of the two locations in question. If it was *not* in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of 300 feet on each side of the vein. If the limitation was in force, then it was void as to the excess over 50 feet on each side of the vein, but valid to the extent of 50 feet, and no more.

The statute also provides, gentlemen of the jury, that "no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust, filled with quartz, or with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, and

it may be many feet thick, or thin in places—almost or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite or nearly barren, and, at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the East Noonday North, for example, discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered, was in this particular valid; otherwise not. The same observation would be true as to each of the other claims held by plaintiff.

I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations, and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid. So also, gentlemen of the jury, where a party has made a location of a mining-claim upon a mineral vein or lode discovered by him, in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downwards vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such surface location." That is to say, if the plaintiffs or their grantors discovered a mineral vein or lode in the North Noonday claim, and made and have now in all respects a valid location of that claim, then they are not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of their surface lines extended vertically downwards, to which no right had attached in favor of other parties at the time their location became valid, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. If the plaintiff has a valid claim to 600 feet wide, then its right extends to all such veins or lodes, under the conditions stated, so within the surface lines bounding the 600 feet drawn vertically downwards; and, if the vein in question is one of the veins having its top or apex within such surface lines drawn vertically downwards, its right extends to and includes that vein. If it has a valid claim to 100 feet wide, and only so much, then to such veins or lodes within the 100 feet lines.

The same principle and instruction applies to the Keystone and East Noonday North claims. If the plaintiff has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar circumstances, the apexes or tops of which lie within the surface lines of such valid location, or locations, extended vertically downwards.

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute it is required that "the *location* must be distinctly marked on the ground, so that *its boundaries can be readily traced*;" but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed.

Any marking on the ground claimed, by stakes and mounds and written notices, whereby the *boundaries* of the claim located *can be readily traced*, is sufficient.

If the centre line of a location of a lode-claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law.

If, therefore, as the testimony tends to show, the locator of the North Noonday mining-claim planted a prominent stake at a shaft sunk in the earth on a vein, lode, or ledge, upon the northern side of which was placed a notice, stating that he claimed fifteen hundred feet on "this the Noonday quartz lode," including all the dips, spurs, angles, and feeders, together with three hundred feet on each side; that said claim begins at a point in the centre of a small shaft about one-fourth of a mile northerly from Queen Bee Hill, and extends thence in a northerly direction fifteen hundred feet to a post and mound upon which is inscribed "Noonday Quartz Lode, Charles Smith's Northern Boundary," and erects such mound and stake at said northern boundary, and marks said inscription thereon, the location is distinctly marked on the ground, so that its boundaries can be readily traced within the meaning of the act, and is a compliance with the law in that particular. The same principle is equally applicable to the Keystone location, and to that of the East Noonday North.

There is testimony tending to show that the rule and custom of miners in Bodie district at the time the several locations under which plaintiff claims were made, required mining-claims to be recorded. If you find such to have been the rule or custom in force at the time, then a record was necessary; otherwise not.

In order to make a valid record it was necessary for it to contain the name or names of the locator or locators; the date of the location, and such a description of the claim or claims located, by reference to some natural or permanent monument, as would identify the claim.

The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such

permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. The record of each location of the North Noonday, Keystone, and East Noonday North, introduced by plaintiff in evidence, contained the names of the locators, the date of their location, and a description of the claim located by reference to both a *shaft* and to stakes planted in the ground having notices of the location thereon.

If you are satisfied from the evidence that these records were in fact made, (and there is no evidence to the contrary,) and that the descriptions of the several claims located therein contained, by reference to the natural and permanent monuments mentioned, were such as would identify the claims with reasonable certainty, then you will find the records sufficient and valid in this particular; otherwise insufficient.

As there has been much comment upon the record of the East Noonday North location, I think it proper to call your attention more particularly to it.

The record appears to be a copy of the notice placed on the claim, and would doubtless so be understood by a miner reading it for information. A person reading the record would be informed by it that the owners of the Noonday claim were the claimants, and that the claim was named the East Noonday North, probably with reference to the Noonday claim; that it was located on Silver Hill, a natural well-known object; that the claim commenced at a stake with a notice on it, of which the record is a copy, placed east of the Noonday shaft, which is a permanent object, having, as the testimony tends to show, already existed eight or ten years, and extended in a northerly direction from the stake fifteen hundred feet by fifteen feet on each side.

There was, then, in the record a description of the location with reference to Silver Hill, a natural object, and the Noonday shaft, a permanent object, and it is for the jury to determine whether a miner seeking information from this record could go to the permanent object, the Noonday shaft on Silver Hill, and thence east, and find the stake and notice pointing out the location on the ground with reasonable certainty. If so, the jury will be justified in finding that there is such a description of the claim in the record with reference to some natural or permanent object, as to identify it, and that the location is valid in this particular. It was not necessary for the claimants to finally mark the location on the ground till after the record was made, and the testimony tends to show that the location was not fully completed until the next day after the record was made, when the locators planted this stake with the notice on the south line of the claim, and of the North Noonday claim 100 feet east of the Noonday shaft, with another at the northerly end, and that this became the final location on the ground, and which, the testimony tends to show, was ever after claimed and subsequently surveyed and stakes placed at the corners.

If the jury find that the location was at that time actually marked upon the ground by stakes and notices, so that its boundaries could be readily traced in the manner I before instructed you was sufficient with reference to the North Noonday claim, then the location was sufficient in this particular also.

The testimony also tends to show that prior to any rights being ac-

quired by the defendant, plaintiff's grantors, in addition to the lode-line stakes set up at the location of their several claims, planted other stakes and monuments at the various corners of their claims, thus forming a parallelogram fifteen hundred feet long by three hundred feet wide, including the Keystone, East Noonday North, and a portion of the original North Noonday claims, with a line of five stakes on each end of the parallelogram, and that they and the plaintiff renewed these stakes from time to time as they were removed until the work was commenced at the combination shaft, which has ever since been continuous to the present time; and it is claimed that if there was at the time of the location any defect in the marking on the ground, this additional marking before any rights were acquired by the defendant was clearly sufficient to validate these claims. In regard to this point, I instruct you, gentlemen, that a subsequent locator cannot object that a prior location of a mining-claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

The testimony tends to show, and there is none to the contrary, that Smith did no work on the North Noonday within the year after he located it in 1875, and supposing he had forfeited his claim, he procured Lockberg to re-locate it for him and convey it on December 16, 1876: that Lockberg did so re-locate it on that day and immediately conveyed it to Smith, who then, either alone, or in connection with others interested with him, entered upon the claim and did sufficient work during the year to hold it for that year; and that Smith paid the recording fees, $15.

If these be the facts, and no other rights had in the meantime attached—and there is no evidence that any had attached—then, if the location made by Lockberg was otherwise sufficient and legal, and Lockberg and Smith were American citizens, Smith, by the several proceedings had acquired a valid right to the claim.

The statute requires one hundred dollars in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and in default of such work being done authorizes the claim to be re-located by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year before other rights attach in favor of re-locators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon, or to re-locate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

It is urged by defendant that Smith was not a citizen, and therefore that he could acquire no right by location. In view of this claim, and in case you find from the evidence this to be the fact, I give you this further instruction:

The testimony shows that Smith, at various times, before defendant acquired any interest, conveyed portions of whatever right he had to other parties next hereinafter named, and finally on September 28, 1878,

conveyed all his remaining interest in all of the claims by specific description to said parties, Irwin, John and James Welch, and Patrick Clancy, in whom, whatever interest had before been acquired by virtue of said several locations, at this time had become vested.

If Smith, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good had he been a citizen until he conveyed to Irwin and others, and if Irwin and his co-grantees were citizens, and after the conveyance to them took possession and control, and kept up the monuments and markings, and performed the necessary conditions to keep the claims good, then they acquired a good and valid right to the claim as against defendant from the date of the conveyance to them, provided that no other rights had attached in defendant's favor prior to such conveyance to them, and such subsequent performance of said required conditions by them.

The East Noonday North claim was located by Welch, Smith, and Irwin, November 27, 1877, before any rights had been acquired by the Orient company, defendant. The claim contains no more than one man was authorized to locate. So that, if one or more of the locators were citizens, in that particular the location of the claim was good as to such citizen or citizens, even though one or more of the others were aliens and not entitled to locate. If, therefore, one or more of these locators were citizens, and the claim was in other particulars well located, and the proper conditions performed to hold the claim till the subsequent conveyance to plaintiff, November 20, 1878, a good title thereto as against defendant passed to the North Noonday company, plaintiff, by that conveyance.

The North Noonday Mining Company, plaintiff, is a corporation created and existing under the laws of California, and is, therefore, to be deemed a citizen within the meaning of the statute, and, as such, is competent to purchase and hold a mining-claim. Irwin, the Welches, and Clancy, as locators of the East Noonday North and grantees of Smith of the other claims and of his interest in the East Noonday North, held all the interest in all said claims acquired by the various proceedings in question, and so holding such interest on November 20, 1878, conveyed all their interest in all said claims to the North Noonday Mining Company, plaintiff, which thereby became vested with all the interest that could be acquired by virtue of said transactions. If, therefore, the grantors of plaintiff had performed all the acts necessary for a citizen to perform in order to locate and hold said several claims down to the date of said conveyance, and the said plaintiff took possession and control of said several claims upon receiving said conveyance, and thereafter kept the said claims properly marked on the ground, and performed all the conditions necessary to maintain their said claims, then said plaintiff acquired a good title to such of said claims as were so properly in form located and kept up as against said Orient mining company, defendant, provided said defendant acquired no rights in said claims, or any of them, prior to the acquisition of said interest by said plaintiff through said conveyance, and such subsequent acts of said plaintiff to preserve their rights to said claims, even though one or more of said original locators should be found not to have been citizens, and,

on that ground, incompetent to acquire any title under said act of Congress.

The testimony tends to show various work done on the several claims by the claimants Welch, Smith, and others during 1877 and 1878, claimed by plaintiff to be sufficient to hold the claims; that Welch, in August, 1878, placed a line of mounds and stakes on each end of the several claims 50 feet apart for a distance of some 300 feet, by way of indicating the corners and end lines; that Anderson, on October 19, 1878, measured off the claims and again set stakes according to the proper measurements; that these stakes being 4 inches square, 3½ feet high, painted white, and marked so as to indicate the corners and lode-line of the said claims, were found there by Scowden when he finally surveyed the claims in the following spring and located the shaft.

The testimony further tends to show—and as to this part of the testimony I believe there is none to the contrary; if there is any you will remember it—that the interest in all the three claims having been concentrated in the plaintiff, the North Noonday Mining Co., in the preceding November, the plaintiff, in March, 1879, before any other parties had entered upon these claims or made any claim thereto, located and made arrangements to sink a three compartment shaft, known as the combination shaft, for the benefit and to be used for the development of all the claims, and also the Noonday claim to the south; that machinery and supplies were at once collected and brought upon the ground for the purpose of sinking said shaft and developing and jointly working all said claims; that from that time on the plaintiff, by its agents and servants, were actually on the ground erecting machinery and buildings, exercising acts of ownership and dominion over the claims, claiming title to the whole; that the plaintiff commenced sinking the combination shaft on or about April 5, 1879, and from that time to the present has been, by its agents and servants, actually on the ground, constantly and vigorously prosecuting the work of developing and working the mines claimed by them, and constantly exercising dominion over them; that by June 1 buildings and machinery had been erected and brought upon the ground, and supplies collected to the amount of more than thirty thousand dollars.

If you find these to be the facts, gentlemen of the jury, then there was not at this time merely a constructive possession of these mining-claims by virtue of the mining laws alone, but an actual occupation and possession, a *possessio pedis*, a physical presence of the plaintiff by its officers, agents, and servants, actually controlling and dominating the claims as early, at least, as the month of March or April, and the domination and possession extended to the bounds of the claims as described in the conveyance to plaintiff, under which it is claimed title, and as indicated by the stakes planted by Anderson and found by Scowden to mark the location, and the notices stating the extent of the claims—the claims lying, the testimony tends to show, in one body and conveyed by one deed to the same party, and being developed by the same means as a part of one general system. If, therefore, you find from the evidence that the plaintiff acquired and maintained a valid location to all or any of these claims in question by the means in these instructions before indicated, and performed the acts of possession just supposed, before

any right had accrued to the defendant, then, as to such claim or claims, the plaintiff had as against the defendant both a good title and rightful possession at the time the tresspasses are alleged to have been committed, and when it is conceded that the defendant actually entered and committed the acts complained of, and you will find for the plaintiff on those points.

If you find title and rightful possession in the plaintiff as just indicated, as to all or any of said mining-claims, you will then inquire, whether the vein or lode in question which the defendant cut in the head of the winze at the end of its cross-cut, called by defendant Orient lode No. 3, is one of the veins or lodes discovered in any of the claims, the right, title, and possession to which you find to be in the plaintiff as against defendant; and if you find that it is one of such veins or lodes, or if you find that it is not one of those lodes, but that it has its apex or top within the side lines of any such claim, the title and possession to which you so find to be in the plaintiff, drawn vertically downwards, then, in either case, it belongs to the plaintiff, and your verdict will be for the plaintiff. But if you find that said vein or lode so cut by defendant is not one of the veins or lodes discovered within any claim, the title to which you find in the plaintiff, and that its apex or top is not within the side lines of any such claim of plaintiff drawn vertically downwards, but is a separate, independent vein, every part of which lies to the eastward, or outside of and beyond any claim, the title to which you find to be in plaintiff, and no part of the apex or top of which is within the side lines of such claim drawn vertically downwards, then it does not belong to plaintiff, and your verdict will be for defendant.

The verdict of the jury was for the plaintiff, with one dollar damages.

## UNITED STATES CIRCUIT COURT, DISTRICT OF CALIFORNIA.

### JUPITER MINING COMPANY *vs.* BODIE CONS. MINING COMPANY.

*Length and width of lode-claims.*—The act of Congress of May 10, 1872, authorizes a claim to be located 1,500 feet in length along the vein, and in the absence of any local rule or custom, the width of such claim may extend 300 feet on each side of the middle of the vein; but said act of Congress, by implication, authorizes the miners to limit the width of such claims to 25 feet on each side of the middle of the vein.

*Miners' rules must be in force.*—To be of any validity, a rule or custom of miners must not only be established or enacted, but must be *in force* at the time and place of the location. It ceases to be operative whenever it falls into disuse, or is generally disregarded.

*Must not conflict.*—The rules and customs of miners must not conflict with the laws of the United States, or the laws of the State in which the claims are located.

*Still in force.*—Section 748 of the Code of Civil Procedure of California is still in force, except so far as it is limited by act of Congress; and no distinction is made by this provision of the State statute between a custom or usage proved by parol evidence and a rule adopted by a miners' meeting and recorded in writing.

*Question of fact.*—Whether or not a mining law or custom is in force at any given time, is a question of fact; but when shown to have been in force, the presumption is that it continues in force until the contrary is proved.

*Void for excess of width.*—Where a location, otherwise valid, exceeds the width allowed by law, it is void as to the excess, but valid as to the extent allowed by law.

*Discovery of a vein.*—No rights can be acquired under the statute, by location, before the discovery of a vein or lode within the limits of the claim located.

*Definition of vein or lode.*—A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, or many feet thick, or irregular in thickness; and it may be rich or poor, provided it contains any of the metals named in the statute. But it must be more than detached pieces of quartz, or mere bunches of quartz not in place.

*Discovery of vein after location.*—A location is made valid by the discovery of a vein or lode at any time after the location, provided that such discovery is made before any rights are acquired in the same claim by other persons.

*First discoverer.*—It is not necessary that the locator should be the first discoverer of the vein; but it must be known and claimed by him, in order to give validity to his location.

*Other veins than those discovered.*—Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim extended vertically downwards, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines.

*How location to be marked.*—A location of a mining-claim must be distinctly marked on the ground so that its *boundaries* can be readily traced; but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds, and written notices, whereby the *boundaries* can be readily traced, is sufficient.

*Right of subsequent locator to object.*—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location, or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim.

*Obliteration of marks.*—After a location has been lawfully made the right of the locator cannot be divested by the mere obliteration of the marks or removal of the stakes without his fault, he having performed the other acts required by the statute.

*As to record.*—The law of Congress requires no record of a mining-claim except in obedience to valid local rules or customs of miners; but when such local rules or customs require a record it must contain the names of the locators, the date of the location, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim; but such natural objects or permanent monuments are not required to be on the ground located, although they may be, and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If by reference to any such natural object or permanent monument the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular; otherwise not.

*Object and effect of record.*—The object of recording mining-claims is to give notice to others desiring to locate in the vicinity. The language of the act of Congress authorizing miners to make regulations, "governing the location and manner of recording," implies that the act of location is distinct from that of recording, except where the regulations of miners make recording necessary to constitute a location; so that a location may be complete and vest the exclusive right of possession before any record thereof is made, unless recording is made an act of location, or one of the acts necessary to constitute a location, by miners' rules or regulations.

*Forfeiture by failure to record.*—The right to a mining-claim will not be forfeited by a failure to record the same in the absence of a miners' rule or regulation providing for a forfeiture on that ground.

*Effect of actual notice.*—In the absence of any miners' rule or regulation making recording a necessary act or condition of a complete location, or providing for a forfeiture by failure to record, a prior location of a mining-claim, without re-

cording the same, gives the locator thereof the exclusive right to possess and enjoy the same as against all persons having actual notice of such location and the extent thereof.

*Work necessary to hold a claim.*—The statute requires one hundred dollars' worth of work on each claim located after May 10, 1872, in each year, and in default thereof authorizes the claim to be re-located by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, and before any re-location is made, he thereby preserves his claim; the statute nowhere authorizes a trespass upon or a re-location of a claim before located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

*Work to hold adjoining claims.*—Where one person or company owns several contiguous claims, capable of being advantageously worked together, one general system may be adopted to work such claims; and work done according to such system for the purpose of prospecting or working all such contiguous claims, although done on only one of such claims, or even outside of all of them, is available to hold all such contiguous claims intended to be worked or prospected by such general system.

Charge to the jury, March 12, 1881. Sawyer, circuit judge.

First in the order of proceedings we would naturally consider the questions that arise on the plaintiff's title. I do not understand the defendant to insist that the plaintiff has not made out a *prima facie* title to the ground covered by its claims, now known as the Jupiter company's ground, embracing the four claims—the Savage, the East Savage, the Riordan and the Daley. It does claim, however, by its own evidence, to overthrow that title, by showing a title in itself prior to and superior to that title. *Prima facie*, I do not understand the defendant to claim that plaintiff has not shown its title to these claims, but the question that arises on its title is, is the point on the Actæon vein where the acts complained of were committed within the claims of the plaintiff? Does the plaintiff own the lead at the point where the acts complained of were performed? If it does not, then it has no title to the vein worked upon, and it is not injured by the act of the defendant, and your verdict must be for the defendant, whether the defendant has shown title to the vein in question or not. Unless the plaintiff has title to that vein, it cannot recover in this action. That point, therefore, is an important one for you to determine, and it is the first question in logical order that arises in this case.

It will be convenient for you to dispose of this first; I will, therefore, first call your attention to it. If you find that point against the plaintiff it will be unnecessary for you to go further. In order that the plaintiff should be the owner of the Actæon vein, it must be one of the veins or ledges which was located in one of plaintiff's four claims, or it must have its top or apex within the side lines of some one of its claims, drawn vertically downwards.

The first question, then, is, is it one of the ledges which plaintiff's grantors located? The point where the acts complained of were performed is here (pointing on the model)—from this point downwards in what has been termed—and the name may be used to designate the place here—the Actæon ledge. The plaintiff insists on two positions: first, that it is the lode which its grantors located in the Savage, and which

claim was located on this lode here which plaintiff's counsel says, according to the strike of the lode, runs somewhere in this direction. The plaintiff does not locate it on or claim that it was any other lode than that, I believe. Then, is it identical with the lode which was located in the Savage claim? Now, this is known to have been exposed, and is seen only in these two places. That fact, in connection with the other facts in relation to the formation of the country rock around here, and the other surrounding facts, is the fact from which you must determine that question—whether it is, or is not, that lode. It is insisted on the part of the defendant that this is a mere spur or offshoot of the Fortuna lode; if it is not such a spur or offshoot, then, it insists, that is an independent lode wholly disconnected from any of the other lodes.

Now, gentlemen, if that is only an offshoot or spur of the Fortuna lode, in such a way as to be simply part of that lode, then the plaintiff has no title to it, and it claims none. It disclaims any title to the Fortuna lode.

It is for you to determine from the testimony whether it is part of the Fortuna lode, or whether it is an independent lode, or if it is a part of the Savage lode. If it is a part of that lode in the Savage, which plaintiff located, then, if the plaintiff has title to the Savage, it has title to that vein. If it has not title to the Savage, it has not a title to the lode through the Savage; or if it is not a part of that lode, then plaintiff has no title to it on that ground.

The next question is, if it is not a part of that lode, then has it its top or apex within the side lines of any one of the plaintiff's claims drawn vertically downwards? Because, if it has, and plaintiff has a valid title to that claim, then it is plaintiff's property. If it has not its apex within the side lines of any of plaintiff's claims drawn vertically downwards, and is not one of the lodes which the plaintiff actually located, then it has no title to it.

Those are the questions of fact for you to determine on this branch of the case. You have heard the testimony, and the comments of counsel on it, and upon the testimony you must determine the questions. It is insisted by the defendant, if this vein is not a spur or offshoot of the Fortuna lode, that then it is an independent lode; and the plaintiff insists, if it is an independent lode, that it has its top or apex within one of its claims; and the defendant insists that the top or apex is outside of the plaintiff's claims.

If it is an independent lode, the question is, in what direction on the dip does it run, and where is its apex or top? Mr. Anderson and Mr. Whiting testified that at this point here, with a mathematical instrument made and used for that purpose, they measured the angles of the dip, and according to their measurement and their testimony the dip would carry it some distance outside of the Daley claim, supposing it to run in that direction to the surface. If it is an independent lode, and has its top or apex outside of the Daley claim, then it does not belong to the plaintiff. If it is inside of the Daley, if it has its top or apex inside of the Daley or Savage, it does belong to the plaintiff, if they have the better title to those claims.

Professor Jenny and Mr. Holmes, on the contrary, testified that they put a plumb-line on the vein, although they do not profess to have

measured the angle, and they say it is nearly perpendicular; and, supposing it to go in that direction to the surface, it would come very near to the Daley line, and a little inside. Where the top or apex is, is for you to determine. The plaintiff claims that, owing to the formation of the country rock, the probability is the vein runs to this point, and then turns off and runs into the Savage. The plaintiff's theory, as I understand the testimony, is that here are two different formations. This formation to the eastward is a secondary formation; this to the westward is the primary, (pointing to the map;) that the line of stratification runs in different directions in the two formations there. That is claimed to be secondary, (pointing.) If you believe that theory as to the formation of the rock here, and believe that the lodes found outside or to the eastward of this blue clay stratum, run in this direction, and the stratification there in the same direction dipping to the west, and the leads and stratification to the westward in this direction, dipping to the east, then it will be a question of probabilities for you to determine whether or not this Actæon lode passes up and crosses over the blue clay stratum into the other formation, thence following its line of stratification to the surface; or is it more likely to have pursued its course in its own formation, following the line of its stratification, as this Fortuna vein has apparently done here on the same side of the stratum of blue clay? This Fortuna vein, it would seem, follows its own formation and line of stratification throughout. You are entitled to consider the probability—if these are different formations, as they say—the probability whether the Actæon vein would run in that direction and pass out here into another formation, or whether it would be confined to the formation in which it is found, and to which it properly belongs. I can give you no further aid on that question. You must take the testimony as you find it, and view it with a candid and impartial spirit, and give such determination to the question as you think all the facts and circumstances in the case justify. If, then, the Actæon vein is not one of the lodes located by plaintiff; if it has not its top or apex within the side lines of any one of the claims of plaintiff drawn vertically downwards, then it is not the plaintiff's lode, and you will have to find for the defendant, whether the defendant owns it or not. If you find for the defendant on that proposition, that disposes of the case, and there is no necessity to spend any further time on the other points of the case. If you find for the plaintiff, however, on that issue, that the Actæon is the lode that the plaintiff has located there in the Savage, or has its top or apex within the side lines of any one of the claims that the plaintiff owns drawn vertically downward, it will be necessary for you to consider the defendant's title—whether the defendant has an anterior and a superior title; otherwise it will not be necessary to look at its title. I will say with reference to this branch of the case, that the plaintiff alleges this to be its lode. It devolves upon plaintiff, therefore, to show affirmatively to you that it is entitled to that lode. The burden of proof is on the plaintiff. If it fails to show it, or if the testimony is equally balanced, then you must find for the defendant; because plaintiff must show by a preponderance of testimony that the lode is within its claim. If it fails on that, your verdict must be for the defendant.

If you find for the plaintiff on that point, as I said before, it will be

necessary to consider defendant's title. I will say, with reference to the defendant, as I said with reference to the plaintiff, when you come to the defendant's title the burden of proof is on the defendant. It devolves on it in the same way by preponderance of evidence to show that its title is anterior and superior to that of the plaintiff.

Now, gentlemen, in order that you may know whether the defendant has a title or not, it will be necessary for you to be informed what it is necessary to do in order to secure a title to a mining-claim.

By an act of Congress, which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase, under regulations prescribed by law, and according to the local customs or rules of miners in the several districts, so far as applicable and not inconsistent with the laws of the United States.

The location under which defendant especially claims was made since May 10, 1872, and at the time it was made the statute of the United States authorized a claim to be 1,500 feet in length along the vein or lode, and it was provided that no claim "shall extend more than 300 feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom *in force* at the time of the location at the place where it is made, the location may extend to the distance of 300 feet on each side of the middle of the vein at the surface; that is to say, the claim may be 1,500 feet in length along the vein by 600 feet wide, including 300 feet on each side of the middle of the vein.

As I construe the statute, however, and so instruct you by implication, the miners, by a rule, regulation, or custom, established and in force at the time and place of the location, may limit the width of the claim to 25 feet on each side of the middle of the vein at the surface. But such limitation to 25 feet on each side, to be valid, must be by virtue of a rule, regulation, or custom which has not only been established, but which is actually in force at the time of the location.

The regulation must be in accordance, and not in conflict, with the laws of the United States and of the State of California; and the laws of California provide that "in actions respecting mining-claims proof must be admitted of the customs, usages, or regulations, established and *in force* at the bar or diggings embracing such claim, and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action." This provision is still in force except so far as its operation is limited by the act of Congress.

The Lucky Jack location, under which defendant claims, was made May 26, 1875, and the claim was located 300 feet wide on each side of the lode in pursuance of the act of Congress allowing such location.

It is claimed by the plaintiff that there was at the time of the location a regulation in force in that district limiting the claim to 50 feet on each side of the vein, and that the location of 300 feet is therefore void. Now, whether there was or not such a regulation or custom *in force* at the time, is a question of fact to be found by the jury from all the evidence in the case on that point.

The plaintiff, to show a regulation limiting the location to 50 feet on each side, introduced the minutes of proceedings of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation, and minutes of meetings held at various times subsequently amending the rules, but continuing this rule in force down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had till December 30, 1876, which is a year and seven months after said location, and nine years after any meeting amending said rules.

The defendant, to meet this testimony, introduced in evidence the mining records of the district, from which it appears that no miners' meeting was held, and no mining recorder was elected from July 3, 1869, till October 9, 1875, more than six years, and that from and including the year 1872, when the act of Congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district, there being none after the passage of the act of Congress in 1872; one in 1873, in which no width was specified, and none in the year 1874; that during the year 1875 eleven quartz locations were made, of which nine were made 300 feet on each side of the lode, and purported to have been made in pursuance to said act of Congress, and two only of 50 feet wide on each side, one of which two was marked on the record as abandoned; and during the year 1876 twenty-five locations appear to have been made, of which five were six hundred feet wide, one an extension of a six hundred feet claim having no width mentioned, and the others fifty feet wide on each side. From this it is argued by the defendant that quartz mining in the district, so far as new locations are concerned, was practically abandoned for several years, and no laws on the subject of new locations were practically in force; that on the return of the miners and the revival of mining in 1875 the act of Congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims 300 feet wide on each side, and in practice adopted and generally acquiesced in that rule during the year 1875, and partially in 1876, till the meeting in December of that year, the rule limiting the claims to 50 feet by common consent falling into disuse and ceasing to be in force.

As held by the supreme court of California, in commenting upon the provision of the State statute cited, which is still in force: "No distinction is made by the State statute between a custom or usage, the proof of which must rest in parol, and a regulation which may be adopted by a miners' meeting, and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following the enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be established, but *in force*."

"A custom reasonable in itself and generally observed, will prevail as against a written mining law, which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time."

It is for you, then, gentlemen of the jury, to determine whether this limitation to 50 feet was actually in force at the time the location of the

Lucky Jack, 300 feet wide on each side, was made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time; and being once in force a presumption would arise that it continued in force till something appears tending to show that it had been repealed, or had fallen into disuse, and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether in view of there being few locations in this district during several years, and none in some, and of the passage of the act of Congress referred to, and the location at first, after the revival of the mining interest in 1875, of almost all claims, in pursuance of the provisions of the act, 300 feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the 50-feet limitation had fallen into disuse, or was really *in force* at the time of the location in question. If it was *not* in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of 300 feet on each side of the vein. If the limitation was in force, then it was void as to the excess over 50 feet on each side of the vein, but valid to the extent of 50 feet and no more.

The statute also provides, gentlemen of the jury, that "no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or with some other kind of rock in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It is not enough to discover detached pieces of quartz, or mere bunches of quartz not in place.

The vein, however, may be very thin, and it may be many feet thick, or thin in places—almost or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places it may be quite or nearly barren, and at other places immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location, including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location, sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the Lucky Jack discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered was in this particular valid; otherwise not. The same observation would be true as to each of the other claims held by the plaintiff or defendant.

The defendant claims that its grantor discovered such a vein or lode as I have described in Lucky Jack, shaft No. 1. You have heard the testimony on the point, and it is for you to determine whether they did or not. If they did, then the location is good in that respect; otherwise it is not.

It is not necessary that the locator should be the first discoverer of the vein, but it must be known to him, and claimed by him, in order to give validity to the location. I instruct you further that if a party should make a location in all other respects regular, and in accordance with the laws and the rules, regulations, and customs in force at the place at the time, upon a supposed vein before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid.

The defendant also claims that its grantors discovered veins in shaft No. 2 and its drifts and cross-cuts, long before plaintiff acquired any rights in the ground. If so, the claim is good in that particular. Similar discoveries are claimed to have been made by its grantors in the Warren Loose shaft, drift, winze, etc.

So, also, gentlemen of the jury, where a party has made a location upon a mineral vein or lode discovered by him in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of his location, and of all veins, lodes, and ledges throughout their entire depth, the top or apex, of which lies inside of such surface lines extended downwards vertically although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical lines of such surface location."

That is to say, if the defendant or its grantors discovered a mineral vein or lode in the Lucky Jack claim, and made and has now, in all respects, a valid location of that claim, then it is not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of its surface lines extended vertically downwards, to which no right had attached in favor of other parties at the time its location became valid, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. If the defendant has a valid claim to 600 feet wide, then its right extends to all such veins or lodes, under the conditions stated, so within the surface lines, bounding the 600 feet drawn vertically downwards; and if the Actæon vein in question is one of the veins having its top or apex within such surface lines drawn vertically downwards, its right extends to and includes that vein. If it has a valid claim to 100 feet wide, and only so much, then to such veins or lodes within the 100 feet lines.

The same principle and instruction apply to the defendant's other claims. If the defendant has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar circumstances, the apexes or tops of which lie within the surface lines of such valid location or locations extended vertically downwards.

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location under the statute it is required that the "*location* must be distinctly marked on the ground so that *its boundaries can be readily traced*," but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed.

Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced, is sufficient. But there must be some such marking, and when a mining-claim is once sufficiently marked out upon the ground, and all other necessary acts of location are performed, it vests the right of possession in the locator, which right cannot be divested by the obliteration of the marks or removal of the stakes without the fault of the locator, so long as he continues to perform the necessary work upon the ground and to comply with the law in other respects.

If, then, the jury believe from the evidence that the Lucky Jack claim did not exceed in quantity the amount allowed by the United States laws, and was located in conformity with the actual practice and custom of miners in force in the year 1875, as to the size of claims in the Bodie mining district, and that before the location of the claims of the plaintiff thereon it was actually and distinctly marked on the ground by stakes, notices, monuments, and work, so that its boundaries could be readily traced, and a vein containing gold or silver had been discovered therein, and sufficient work was done thereon to comply with the laws of Congress and the local regulations, and if no record was required other than that actually made, then the Lucky Jack location was valid, and entitled the locator to the exclusive possession thereof; otherwise not.

There is testimony tending to show that the rule and custom of miners in Bodie district at the time the Lucky Jack location, under which defendant claims, was made, required mining-claims to be recorded within a certain time after location, and testimony also tending to show that there was no mining recorder elected in Bodie district from July 3, 1869. to October 9, 1875—more than six years, including the period of this location; and that, during a portion of this time, at least, in the apparent uncertain condition of affairs, some locators recorded their claims in the office of the county recorder, and also in the books of the district in the possession of the last preceding recorder, or of the last preceding deputy recorder of the district, and the Lucky Jack, at least, in the county recorder's office only.

If you find a rule or custom to record to have been in force in the district at the time, then a record was necessary to perfect and preserve the rights of the locators as against all subsequent locators, at least, not having actual notice of the prior location. If no such custom was in force, then no record was necessary. It was only necessary, in any event, to record at the place where the custom known and in force at the time of the location required the record to be made. If it was sufficient under the custom in force, to record the location in the county recorder's office, then a record there was sufficient; otherwise not. And the fact that many miners did so record is evidence tending to show that they thought such record available, and relied on it, and tends to show such custom. The custom to record, *and the place of the record*, to be binding,

ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what is required to make and preserve a valid location. It is for you, gentlemen, to determine from the evidence in the case what record, if any, and the place where it must be made, the custom in force at the time required; whether the custom was in all particulars sufficiently known and recognized to make it binding upon the miners; and whether the location of the Lucky Jack claim substantially conformed to it. In determining these questions the fact, if it be a fact, that there was an uncertainty as to where a record should be made—some recording in the district records, some in the county recorder's office, and many in both; the fact that there was no recorder elected for six years; that Bechtel, the last deputy, and the man who seems to have actually done the recording, resided during a portion of the time out of the district, coming, in some instances, at the request of parties, from his residence into the district to record claims; and the fact that miners, at their first meeting in October, 1875, after several years' *hiatus* in their meetings, deemed it necessary, or at least prudent, to ratify and validate by resolution the records of the preceding five or six years, are all circumstances that the jury are entitled to consider, as tending to show that there was no custom as to the place where the record should be made, prevailing during that period, sufficiently certain, well known, and defined, and generally recognized and acquiesced in, to be of any binding force.

The jury are entitled to give these circumstances such weight, in connection with all the other evidence bearing upon the question, as they deem them entitled to receive. And it is for you to determine whether, under the circumstances, a record in the county recorder's office was sufficient.

If a record was required, then, in order to make a valid record, it was necessary for it to contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located, by reference to some natural or permanent monument, as would identify the claim.

The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground.

The exact effect of a record, or want of a record, I have not before had occasion to consider. The law of Congress authorized miners to make regulations "governing the location and manner of recording mining-claims." This language implies that the act of location is distinct and different from the act of recording, except in districts where the regulations of the miners make the recording an act of location, or one of the acts necessary to constitute a location. But in the Bodie mining district there is no evidence of a miners' regulation or rule which makes recording an act of location, or necessary to a valid location. The location is always referred to in the rules in evidence as distinct from and preceding the record, so that a location of a mining-claim in that district, at any time in the year 1875, may have been complete or perfect before any record thereof was made.

Independent of the question of forfeiture, therefore, it follows under the written rules in evidence that by an otherwise valid location of a mining-claim in the Bodie mining district, at any time in 1875, a person may have acquired the exclusive right of possession and enjoyment of such claim, at least as against other parties having actual notice of the claim, its position and extent, before recording such location.

Assuming the proposition that the miners have authority to make a regulation or law by which a mining-claim may be forfeited by failure to record the location thereof, yet such regulation or law, in order to effect a forfeiture, must provide that such failure to record shall work a forfeiture of the claim. In the language of the supreme court of California: "The failure of a party to comply with a mining rule or regulation cannot work a forfeiture unless the rule itself so provides. There may be rules and regulations which do not provide that a failure to comply with their provisions shall work a forfeiture; if so, a failure will not work a forfeiture." (Bell *vs.* Bed Rock Co., 36 Cal., 219.) "The failure to comply with any one of the mining rules and regulations of a district is not a forfeiture of title. It would be enough to hold the forfeiture as the result of non-compliance with such of them as make non-compliance a cause of forfeiture." (McGarrity *vs.* Byington, 12 Cal., 431.) As a general principle of law forfeitures are not favored.

The object of recording mining-claims is to give notice to others desiring to locate claims in the vicinity. The Congressional law does not require a record, but prescribes what a record shall contain when it is required by the local rules.

If there were no local rules in Bodie mining district attaching the penalty of forfeiture to the failure to record in that district, and recording was not made by custom an act of location, then the fact that the Lucky Jack claim was not recorded in the records of Bodie mining district will not invalidate the location, as to any party having actual notice of that location; and in that case the jury are instructed that if the Lucky Jack location was regular in all other respects, and the laws requiring work were complied with, the fact that the claim was not recorded in the Bodie mining district did not invalidate the location, or make it lawful for plaintiff's grantors, if they had actual notice of the previous location, to enter and locate the ground covered by the Lucky Jack location.

The testimony also tends to show that prior to the location of the Daley claim, or to any rights being acquired thereunder by the plaintiff, the defendant or its grantors, in addition to the stake or stakes, whichever it was, and notice put up at the time of location of the Lucky Jack claim, surveyed out that claim and planted prominent surveyor's stakes and monuments at the various corners of the claim, distinctly marking it out and forming a parallelogram fifteen hundred feet long by three hundred feet wide, and entered into actual possession; and it is claimed that if there was at the time of the location any defect in the marking on the ground this additional marking, before any rights were acquired by the plaintiff in the Daley, was clearly sufficient to validate the claim as to that location. In regard to this point, I instruct you, gentlemen, that a subsequent locator cannot object that a prior location of a mining-claim was not sufficiently marked on the ground at the time of its loca-

tion, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

If, therefore, the claimants of the Lucky Jack surveyed and properly staked or marked out their claim, and performed all the other acts necessary to make a valid location, before any rights were acquired in the Daley ground by the location of that claim, then the better title vested in the owners of the Lucky Jack to all the Daley claim embraced in the Lucky Jack, which the locators of the latter were entitled to locate and hold.

The statute requires one hundred dollars in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and in default of such work being done, authorizes the claim to be re-located by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of re-locators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon, or to re-locate a claim before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

Whether the work was done as required by the statute, is a question for you to determine from the evidence. Work done by any of the grantors of defendant while holding the claim, whether holding the legal or equitable title, during the performance of the labor or work done in the interest of the claim, is available to preserve the claim; and no mere re-location for forfeiture, made before the forfeiture actually attaches by actual default, would be valid to defeat the claim. Any work done by the Bodie company on the claim for that purpose, after the conveyance to it October 7, 1877, and before May 26, 1878, is available as work for the year from May 26, 1877, to May 26, 1878, to prevent a forfeiture. With regard to the work required to be done in order to hold a claim, the jury are further instructed that where one person or company owns several contiguous or adjoining claims, capable of being advantageously worked together, one general system may be adopted to work such claims. Such system may consist of a shaft with drifts, cross-cuts and tunnels therefrom, and such works need not be upon any of the claims in question. When such system is adopted, work in furtherance of the system is work on the claims intended to be developed by it. Work done outside of the claims, or outside of any claim, if done for the purpose and as a means of prospecting or working the claim, is as available for holding the claim as if done within the boundaries of the claim itself.

To conclude, gentlemen of the jury, in view of the legal principles I have stated to you, if you find from the evidence that the so-called Actæon vein, upon which the trespass is alleged to have been committed, is not one of the veins actually located in either the Savage, East Savage, Riordan, or Daley claims, and if its top or apex is not within the planes of the side lines of either of said claims drawn vertically downwards,

then it does not belong to the plaintiff, and your verdict must be for the defendant, whether it has the title to the claim or not. The plaintiff cannot recover unless the vein belongs to it. So if the top or apex of said Actæon vein is within the planes of the side lines drawn vertically downwards of any mining-claim to which the defendant has shown a valid title prior in point of time to the title to any of the four claims relied on by plaintiff in like manner embracing said vein, whether such valid prior claim of defendant be 600 or 100 feet wide, the verdict must also be for the defendant.

But if, on the contrary, you find that the said Actæon vein, at the point where the trespass is alleged to have been committed, is the vein actually discovered and located by plaintiff's grantors, in any one of the said four claims of the plaintiff, or that it has its top or apex within the planes of the side lines of any one of said four claims drawn vertically downwards, and if you further find that the defendant has not shown a title as against said plaintiff by a valid subsisting prior location embracing said top or apex within its side lines drawn vertically downwards, then your verdict must be for the plaintiff.

## UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

### ERHARDT *vs.* BOARD.

*Mining-claim—Discovery stake—Possession.*—The statute of Colorado, which gives sixty days after the discovery of a mining-claim in which to sink a discovery-shaft and make location, does not require the discoverer to remain during that interval and in actual personal possession, by being present upon the ground. The erection of the discovery-stake, with the required notice thereon, is notice to all others of the claim of the discoverer, and amounts to constructive possession, which is sufficient during the period provided by the statute.

*Assessment work—Intimidation.*—That the discoverer is prevented from doing assessment work within prescribed time by intimidation on the part of an adverse claimant, is sufficient excuse, and will not deprive him of his right to locate the claim.

Miller, J.:

Plaintiffs, while prospecting on the public domain, discovered mineral about two feet from the surface of the ground, and on the 17th day of June set up their discovery-stake, containing the name of the lode—Hawk—the date of the discovery, the name of the discoverers, and the other matters substantially as required by law. On the 30th day of June, thirteen days thereafter, the defendants pulled up the stake so set by the plaintiffs, threw it away, entered into possession, and went to work in the same hole, and having sunk the shaft to the required depth, made a location of the claim.

Plaintiffs brought their action at law for the possession, alleging that they were the discoverers thereof, had planted their discovery-stake, and within the sixty days allowed by law in which to complete the sinking of their prospect shaft and make their formal location, the defendants wrongfully entered and hold the claim; and plaintiffs seek an injunction in aid of their action at law, to restrain the defendants from working the claim and removing ore therefrom. The affidavits filed in support of the motion for injunction show that in consequence of threats made by defendants, plaintiffs were deterred from entering on the claim and prosecuting the development work within the time required; and that, though they procured a survey to be made upon which to make

out a location certificate, this was done secretly by the officer who made the survey for defendants. It is claimed for defendants that the plaintiffs were not in actual possession of the claim between the 17th day of June, the time they set their stake, and the 30th of June, when defendants entered; and further, that the notice upon the discovery-stake of plaintiffs was not sufficient, in that it failed to give the course of the lode.

The law of the State gives sixty days after making discovery of mineral, in which to sink a shaft ten feet in depth. The main object of the sixty days' possession, it seems to the court, must be to allow time to discover the course of the lode, in order that the location may be made thereon. Counsel for defendants made an ingenious argument to show that the locator during those sixty days, to hold his right, must remain in continuous actual possession of the ground. The court does not so hold. If the discoverer put up a stake at the discovery, giving the name of the lode, date of discovery, and notice of his intention to locate the claim, this is equivalent to actual possession. Otherwise the statute serves no useful purpose. The intention of the statute must be that the setting up of the discovery-stake with the notice thereon as required, is equivalent to actual possession for the sixty days, within which he may proceed to the next step, to wit: Sink the discovery-shaft to the depth of ten feet, have survey made, mark the lines, and make formal location.

That the plaintiffs did not sink the shaft to the required depth of ten feet within the sixty days cannot prejudice their right in this case, for the reason that the defendants prevented them from so doing by taking possession of their excavation. Plaintiffs could not prosecute their work while the defendants were in the occupancy, and this is sufficient reason for not sinking the shaft within the time prescribed. The injunction will be awarded.

## UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

### ERHARDT *vs.* BOARO.

*Discovery—Location—Time allowed.*—Upon the discovery of a lode bearing silver in the public lands, a citizen is entitled to locate a full claim, and he has the time allowed by law to complete the location.

*Notice—How made.*—A notice posted at the point of discovery, specifying the nature and extent of his claim, will protect the locator's right for the time allowed by law in which to complete the location, although he may be absent from the claim during part of such time.

*Same—Must specify extent of claim*—But if he fails to specify, in his notice of discovery and claim to the ground, the extent of his claim, as that it extends a certain distance from the point of discovery in a direction named, it will relate only to the place where it stands. As against others afterwards locating in the vicinity, it will cover only ground necessary for sinking a shaft.

*Estoppel—Trespasser.*—One who goes on ground taken up by another for mining purposes during the temporary absence of the first locator, and excludes him therefrom, and thereby prevents the first locator from completing his title, shall not be permitted to allege any defect in that title.

Ejectment for a mining-claim in the county of Dolores, called by plaintiff Hawk-lode, and by defendant Johnny Bull lode. Plaintiff alleged a location begun in June, 1880, by one Thomas Carroll, who was employed by plaintiff to search for lodes, under an agreement to give plaintiff four-fifths interest in all locations made by him, Carroll retaining one-fifth for himself.—Carroll testified that he found at the place in

controversy, on the surface of the ground, indications of a lode, and, with a pick, made an excavation a foot or eighteen inches in depth, which disclosed a lode very clearly, and that he planted there a discovery-stake, claiming the lode for plaintiff and himself. The notice on the stake was in the usual form, except that nothing was declared as to the length of the lode, or its extent in either direction from the point of discovery. The stake was set up on the 17th day of June, and Carroll returned to the place about the 1st of August thereafter, with intent to resume work and to sink the shaft ten feet or more, and complete the location. Finding the place occupied by Boaro and Hull, two of the defendants, he was deterred from any attempt to regain possession by threats of violence from them. The threats were not made to Carroll, but were communicated to him by others. Aside from the testimony of Carroll himself, to the effect that the threats were communicated to him, there was nothing to show that they were made during the time for completing the location; but some witnesses testified that they heard threats from the parties in possession after that time. Carroll also said that the situation of the defendants as "jumpers" induced him to believe that they would resist his claim with force. At all events, he made no demand for the premises, nor did he attempt to go on with the work after he discovered that they were occupied. He applied to plaintiff's agent in Rico for assistance to regain possession, which was denied him, on the ground that legal steps would be taken for that purpose. Carroll's testimony was supported by other witnesses on some points, which it is not necessary to enumerate. A surveyor employed by defendants to survey the ground for re-location, without the knowledge of defendants, set up boundary stakes for plaintiff's Hawk location, and gave a description of the premises, which plaintiff inserted in a certificate of location, and filed it for record within the time limited by statute for making and recording such certificate. Neither Carroll nor plaintiff sunk any discovery-shaft on the ground in dispute, or posted a notice of discovery, except that mentioned by Carroll as having been set up on the 17th of June.

At the close of plaintiff's testimony defendants moved for judgment of nonsuit, on the ground that plaintiff had not shown a location complete under the statute. Counsel urged that plaintiff could have no right to the possession except on proof of all things necessary to a valid location, done within the time limited by law; and this, although it should appear that defendants prevented Carroll from going on to complete the location, by threats or by occupying the ground. And it was said, that to give plaintiff a right of action, would be to declare that the work done by defendants in sinking a discovery-shaft, and putting up notice of discovery, should inure to plaintiff's benefit.

The court said that no such presumption could be indulged, and that it was not necessary to assume that the work had been done by any one. If, as contended by plaintiff, defendants took possession of the ground with knowledge of Carroll's prior location, and prevented Carroll and the plaintiff from going on with the work, they should not have advantage of their own wrong. Under the circumstances charged, the defendants could not be allowed to deny the force and validity of plaintiff's location in any way. The motion for judgment was denied.

Defendant Boaro then testified that he made the Johnny Bull location in the last days of June, 1880. That he found nothing on the surface of the ground to indicate a lode, nor any such excavation or stake as that mentioned by the witness Carroll. That, upon all the territory covered by the location, there was nothing whatever, at the time he went on the ground, to show that it had been located on the 17th day of the same month, or at any time. This witness was supported in some portions of his testimony by others, and, on the whole evidence, it must be said that it was very conflicting on the principal points affecting the two locations. But it was conceded that the plaintiff's, if made at all, was prior to the other in time.

In the course of the trial it became a question whether the plaintiff, on evidence of title to four-fifths interest in the Hawk location, could have judgment for the entire interest. Counsel maintained, that in an action against a stranger to the title, a tenant in common may sue for his co-tenants as well as himself. The point was not then decided, and afterwards proof was offered by defendants of certain declarations of Carroll, to which plaintiff objected, that he was not bound by them. But the court said, that if the suit was brought for Carroll's interest, as well as that claimed by plaintiff in his own right, the declaration should be received, as affecting Carroll's one-fifth interest. Thereupon the plaintiff declared that he would maintain his action for his own interest only, and the evidence was excluded. Plaintiff asked leave to amend his complaint, to demand four-fifths interest instead of the whole, and it was allowed him.

The court charged the jury as follows, (Hallett, J.):

*First.* The first question for the consideration of the jury is as to the discovery of a lode or vein of silver-bearing ore by Carroll at the place in controversy. It is incumbent on the plaintiff to show, by preponderance of testimony, that such discovery was made. On this point there is the testimony of Carroll as to what he found there, and some evidence on both sides as to the condition of the ground in the locality. The position of the plaintiff is, that the lode cropped out at the place, and was clearly disclosed by the slight work with a pick which Carroll testifies to. The position of the defendants is, that there was not on the surface of the ground any indication of a lode, and that it was necessary to make a considerable excavation to reach the lode. They also claim that there was no excavation whatever, such as mentioned by Carroll, at the place in controversy, at and before the time of the location by Boaro. I am requested by plaintiff's counsel to add that it is not essential to the validity of a discovery that the mineral-bearing rock should be found in place.

If the outcrop of the vein or body of mineral-bearing rock is found on the surface, the law allows the discoverer the period of sixty days from the date of his discovery, for showing the vein or body of mineral-bearing rock to be in place at a depth of ten feet or more from the surface. That proposition is correct.

The foregoing question, on which the testimony is conflicting, you are to determine; and if, upon that, you find for the plaintiff, you should proceed to the matters hereinafter stated. If, on that point, you find for defendants, your verdict will be for them on that alone, without reference to any other matter.

*Second.* If you find the first point for plaintiff, a further question for your consideration is as to the posting of notice at the point of discovery. It is incumbent on the plaintiff to show, by preponderance of testimony, as before stated, that a notice of the discovery and of the claim of the locator was put up at the point of discovery.

Notice in any other form would be as effectual probably, but, as the plaintiff claims that the notice was posted on the claim, it is only necessary to consider whether that method was adopted.

Carroll testifies that he posted a notice in his excavation at the point of discovery, and there is some evidence of admissions or declarations by Boaro to the effect that he found a stake there when he went on the ground. The defendants claim that no such notice was posted, and none found there by Boaro when he made his location. This is a controverted question, similar to the first stated, which you are to determine on the evidence.

If you find that notice was posted, as testified by Carroll, you should also find that it was sufficient for the purpose for which it was designed, with this modification. It is in evidence, and it seems to be conceded by plaintiff, that the notice on the stake contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom.

In this respect the notice was deficient, and, under it, the locators could not claim more than the very place in which it was planted. Elsewhere, on the same lode or vein, if it extends beyond the place in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, cannot be said to have any extent beyond what would be necessary for sinking a shaft.

*Third.* If you find these matters for the plaintiff, a third question for your consideration is, whether defendant Boaro, in making the location under which defendants claim, went into the slight excavation made by Carroll and there sunk his own discovery-shaft, or ran his own cut, making that the basis of defendants' location.

If he did so, the plaintiff having then a right to that locality, as before explained, the entry of Boaro was an intrusion into his territory, for which he may maintain this action. But it should appear to you, from the evidence, that Boaro entered at the very place which had been previously taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted. Possibly the rule here laid down may be applicable to the case in which a subsequent locator may sink his discovery-shaft so near to that of the first locator, as to prevent further work by the latter in the development of the claim. But it is not necessary to advert to that matter, for the plaintiff contends that Boaro went into the very place where Carroll made his excavation and planted his discovery-stake, and there made a cut, shaft, or other opening, on which to found his own location.

That is the question in issue between the parties, and you should decide it on the evidence.

*Fourth.* These things being found for the plaintiff, a fourth question for your consideration is, whether Carroll, after discovering the lode, abandoned it.

To perfect their location, it was incumbent on the plaintiff and Carroll, as the locators of the claim, to sink a discovery-shaft within sixty days after the date of location, and to do the other things required by statute within ninety days from that date. Failing in that, they would have no right whatever to the territory in controversy. And although Carroll may have intended to do the necessary work, and to perfect the location within the time limited by statute at the time he set up his stake, if he afterwards abandoned that intention the plaintiff cannot recover. It should appear to you, from the evidence, that the plaintiff and Carroll, at the time the Hawk location was made, and continuously thereafter, held and maintained the purpose and intention to complete the location, and that they were prevented from doing so by the act of Boaro and Hull in taking possession of the place in controversy, and excluding Carroll and the plaintiff therefrom. If, by the use of reasonable diligence, the plaintiff and Carroll could have obtained possession for the purpose of doing the necessary work, it was their duty to use such dilligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand. But they were not bound to attempt to do the work at any other place than that which had been selected by Carroll, nor were they bound to use force to gain possession, or even to bring an action therefor. If they were excluded by Boaro and Hull from the possession of the very place selected by Carroll for his discovery-cut or shaft, with intent on the part of the latter to hold the ground against them, it is enough on this point.

*Fifth.* These several questions must be found for plaintiff, by preponderance of testimony, to support a verdict in his favor; for if, after one has discovered a lode, and set up a notice of his claim to it, and within the time fixed by law for doing the work necessary to a valid location, another coming to the same place and taking possession thereof, to the exclusion of the first, shall not have advantage of his own wrong; nor shall the subsequent locator in such case be permitted to allege anything against the right of the first locator.

To permit the junior locator to deny the right of the other, under such circumstances, would be to deny him all remedy, which cannot be allowed.

And, therefore, if the facts mentioned are established by the evidence, the regularity and validity of plaintiff's location shall be assumed. And if upon the evidence, you affirm the foregoing propositions for the plaintiff, your verdict should be for him. If you deny any or all of them, you should find for defendants.

The jury returned a verdict for the defendants.

UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

CROSSMAN *vs.* PENDERY.

*Mining-claim—Possession before discovery of mineral in place.*—The prospector upon the public domain can hold to the extent of his claim in actual possession prior to the discovery of mineral in place; but if he stand by and permit another to sink a shaft within his boundaries, and the latter first discovers mineral, his will be the better claim.

Miller, J.:

This cause is submitted upon an agreed state of facts, to the effect

that the ground in controversy is covered by the surface lines of the Orion claim, located by plaintiff, and also of the Pendery claim, located by defendant; that both locations are regular as to form; that the Orion was first located, surveyed, and staked; that the locators have steadily prosecuted work in the development thereof, and have discovered mineral in place; that the discoverers of the Pendery located subsequently to the Orion, and while the locators of the latter were in possession thereof, also prosecuted work and discovered mineral in place before the discovery by the locators of the Orion. The question submitted to the court is this: Can prospectors on the public mineral domain acquire any right in which the law will protect them, prior to the discovery of mineral in rock in place? And, if so, can plaintiffs, being prior locators, recover against defendants, who first discovered mineral on the ground in controversy?

It is the opinion of the court, that inasmuch as the plaintiffs allowed the defendants to enter upon their claim and within their boundaries, and there sink a shaft, in which they discovered mineral in rock in place before discovery by plaintiffs, and make location thereof without protest, the defendants now have the better right. But the plaintiffs might have protected their actual possession of their entire claim by proper legal proceedings prior to the discovery of mineral by the defendants, or by either party.

A prospector on the public mineral domain may protect himself in the possession of his *pedis possessionis* while he is searching for mineral. His possession so held is good as a possessory title against all the world, except the government of the United States. But if he stands by and allows others to enter upon his claim, and first discover mineral in rock in place, the law gives such discoverer a title to the mineral so first discovered, against which the mere possession of the surface cannot prevail; and in this case the judgment must be for the defendants.

UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

IRON-SILVER MINING CO. *vs.* CHEESEMAN.

*Mining location—Patent—What they carry with them.*—The law provides that upon a location properly made the claimant shall have the vein upon which the location is made, and all other veins and lodes having their top or apex within the lines of the location; and not only within the body of the claim within the lines of the location, but beyond those lines as far as the vein or lode may, in its descent into the earth, pass beyond those lines and within the end lines of the location.

*Vein, lode, or ledge—Definition of—Existence of, a question of fact—Vein, lode, and ledge* are the words used in the statute to designate a mineral deposit in rock, and are supposed to be nearly synonymous in meaning. For the purposes of this case it is sufficient to say, that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. The existence of such a vein or lode is a question of fact to be found by the jury from the evidence before them.

The following is the essential portion of the charge of Judge Hallet, in the case of the Iron-Silver Mining Company *vs.* Walter S. Cheeseman *et al.*, recently tried at Denver. The defendants, owning the Smuggler location, adjoining the Lime location of the plaintiffs, were working, as the latter claimed, upon the vein of which the plaintiffs' location contained the outcrop. The jury found a verdict for the defendants.

Whether in the ground in controversy there is a vein or lode bearing

silver within the meaning of the act of Congress, is the principal question in this case. The words used in the statute to designate a mineral deposit in rock in place are *vein*, *lode*, and *ledge*, and these are supposed to be nearly synonymous in meaning. However these words may differ in meaning, it is not important in this case to look for a distinction between them. Nor is it important to define their meaning in a manner that may be accepted in all cases. Any effort so to define them would probably result in failure; but we must seek for a meaning which will enable us to reach a conclusion in this case. So proceeding, it is enough to say that a vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. This is a sufficient description, certainly, as to all bodies of ore that may be found within the lines of the location. As to what may be found within the body of the claims, there being no conflicting location, it is not very important to consider whether it is in place. But the statute giving the right to pursue the lode beyond the lines of the location in a downward course refers to veins or lodes *in place;* and whenever such right may be claimed or asserted, it is important to consider whether the vein or lode, or that which may be alleged to be such, is *in place* within the meaing of the act of Congress.

And first, on that point, it may be said that, if the ore-body is continuous to the extent that it may maintain that character, it is in place. So far as the ore-body is continuous, it must have been deposited in that form or removed bodily, and with its enclosing rocks, to the place in which it may be found. And in either case, as to such continuous ore-body, it is proper to say that it is in place within the meaning of the act. And this is the point in controversy between the parties. You will remember that the witnesses for the plaintiff unite in saying that the ore extends with more or less uniformity, and that it is practically continuous from the plaintiff's claim into and through the defendants' claim so far as it has been explored. The plaintiff produced assays to testify that samples of ore were taken from all parts of the vein, and found to contain silver and lead. The maps put before you by plaintiff, to show the condition of the ground, give the vein as extending from one claim to the other, and clearly that is the position assumed. On the other hand, defendants contend that the ground in controversy is so broken, and the several parts so intermingled, that there is not and cannot be a body of ore extending for any considerable distance through any part of it. They have many witnesses to testify to that condition of the ground. They concede that in the ground in controversy there are detached fragments, particles, and perhaps masses of ore intermingled with the country rock in the like fragments, particles, and masses. But they deny that there is anything like a continuous body or sheet of ore extending from one claim to the other. And this is the question in issue. It is pretty nearly a direct issue between the witnesses for the plaintiff and the witnesses for the defendants; and as you give credit to one party or the other, you should find the fact.

I do not think that I can in any manner make it clearer to you.

I have to say, also, that the burden of proof is upon the plaintiff by a preponderance of testimony to establish the facts which are necessary to support a finding in its favor; and the fact mainly in issue, as I have

stated to you, is, what is the condition of this ground extending from one of these claims to the other?

A good deal has been said by the witnesses as to whether there is a top or apex of the vein. That depends, gentlemen, very much as to whether there is any vein or lode there. If you find that there is a vein or lode, to my mind the evidence is clear enough that the top of it is the Lime location; and if there is none there, of course that which does not exist, does not exist in any part—it does not exist by its top nor by its bottom, nor anywhere between the two points.

So that it is, gentleman, a question of the credibility of witnesses. The testimony is strongly conflicting; I do not think I have ever known a case in which it was more so, and, as I have said, the question is as to which one of these theories you will accept.

Now, I ought to say to you further, that as to this ore-body that I have spoken of, whether it is of greater or less extent—that is, whether it is very thin or very thick—is immaterial. If it extends, as claimed by the plaintiff, from their claim to and into the other, the strength of the vein is not material. Their position is, as you remember, that it extends all the way from their claim to and into the other, so far as it has been explored; and it is not material whether it is strong or weak, if it extends in the manner described by them.

But if the territory is, as claimed by the defendant, so broken up, jumbled, and mixed, the several parts together, that there is nothing continuous, of course there can be no lode extending from one claim to the other.

## SUPREME COURT OF THE UNITED STATES.

### BELK *vs.* MEAGHER.

*Re-location—Resumption of work.*—If work is resumed on a claim after it has once been open to re-location, but before a re-location is actually made, the rights of the original owner stand as they would if there had been no failure to comply with the law.

*Annual expenditure.*—The law fixes no time within a year when the work must be done, and there can be no forfeiture until the entire year has gone by.

*Possession.*—Actual possession is not necessary for the protection of a mining title, after a proper location has been made.

*Re-location—Must be valid when made.*—A re-location, invalid because made before the year's end, does not become operative at the expiration of the year. Actual possession, in such case, could alone prevent other parties from making a legal re-location.

In error to the supreme court of the Territory of Montana.

Mr Chief Justice Waite delivered the opinion of the court.

This is an action of ejectment brought by Belk, the plaintiff in error, to recover the possession of a certain alleged quartz lode mining-claim, being, as is stated in the complaint, "a re-location of a part of what is known as the old original lode-claim." Passing by for the present the exceptions taken to the rulings of the court at the trial on the admission and rejection of testimony, the facts affecting the title of the respective parties may be stated as follows:

In July or August, 1864, George O. Humphreys and William Allison located the discovery-claim on the original lode and claims one and two west of discovery. These locations were valid and subsisting on the 10th of May, 1872, and no claim adverse to them then existed. No work

was done on them between that date and June, 1875. During the month of June, 1875, and before any re-location had been made, the original locators or their grantees resumed work upon the claims, and did enough to re-establish their original rights, if that could be done by a simple resumption of work at that time. No work was afterwards done on the property by the original locators, or any one claiming under them, and it does not appear that they were in the actual possession of the claims, or any part thereof, on the 19th of December, 1876, or for a long time before. It is conceded by both parties that the original claims lapsed on the 1st of January, 1877, because of a failure to perform the annual work required by the act of Congress in such cases.

On the 19th of December, 1876, Belk made the re-location under which he now claims, and did all that was necessary to perfect his rights, if the premises were at that time open for that purpose. His entry on the property was peaceable, no one appearing to resist. Between the date of his entry and the 21st of February, 1877, he did a small amount of work on the claim, which did not occupy more than two days of his time, and probably not so much as that, and he had no other possession of the property than such as arose from his location of the claim and his occasional labor upon it. On the 21st February, 1877, the defendants entered on the property peaceably and made another re-location, doing all that was required to perfect their rights, if the premises were at that time open to them. The possession they had when this suit was begun was in connection with the title they acquired in that way.

Upon this state of facts the questions presented in argument for our consideration are—

1. Whether the work done in June, 1875, was sufficient to give the original locators, or those claiming under them, an exclusive right to the possession and enjoyment of the property until January 1, 1877;

2. Whether if it was, a valid re-location of the premises, good as against everybody but the original locators or their grantees, could be made by Belk on the 19th of December, 1876, his entry for that purpose being peaceable and without force;

3. Whether if Belk's re-location was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed; and,

4. Whether, even if the re-location of Belk was invalid, the defendants could, after the 1st of January, 1877, make a relocation which would give them as against him an exclusive right to the possession and enjoyment of the property, their entry for that purpose being made peaceably and without force.

By "An act to promote the development of the mining resources of the United States," passed May 10, 1872, (17 Stat., 91, chap. 152, sec. 3,) it was provided that the locators of all mining locations theretofore made, or which should thereafter be made on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim then existed, should have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they complied with the laws of the United States, and with State, Territorial, and local regulations, not in conflict with the laws of the United States governing their possessory title. By the same act

(p. 92, sec. 5) it was further provided that on all claims located prior to the passage of the act, ten dollars' worth of work should be performed or improvements made each year for each one hundred feet in length along the vein; until a patent should have issued therefor, and upon a failure to comply with this condition the claim or mine on which the failure occurred should be open to re-location in the same manner as if no location of the same had ever been made, provided the original locators, their heirs, assigns, or legal representatives, had not resumed work on the claim after the failure and before the re-location. By another act, passed March 1, 1873, (17 Stat., 483, chap. 214,) the time for making the first annual expenditure, under the act of 1872, was extended to June 10, 1874; and by an act of June 6, 1874, (18 Stat., 61, chap. 220,) to January 1, 1875. The exact language of this last act is as follows: "That the provisions of the fifth section of the act * * * passed May 10, 1872, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act, shall be extended to the first day of January, 1875."

For all the purposes of this case the law stands as it would if the original act of 1872 had provided that the first annual expenditure on claims in existence when that act was passed might be made at any time before January 1, 1875, and annually thereafter until a patent issued. If not made by that time, the claim would be open to re-location, provided work was not resumed upon it by the original locators, or those claiming under them, before a new location was made. Such being the law, it seems to us clear that if work is renewed on a claim after it has once been open to re-location, but before a re-location is actually made, the rights of the original owners stand as they would if there had been no failure to comply with this condition of the act. The argument on the part of the plaintiff in error is that, if no work is done before January, 1875, all rights under the original claim are gone; but that is not, in our opinion, the fair meaning of the language which Congress has employed to express its will. As we think, the exclusive possessory rights of the original locator and his assigns were continued, without any work at all, until January 1, 1875, and afterwards if, before another entered on his possession and re-located the claim, he resumed work to the extent required by the law. His rights after resumption were precisely what they would have been if no default had occurred. The act of 1875 is in form an amendment of that of 1872, and all the provisions of the old law remain in full force, except so far as they are modified by the new.

From what has thus been said, it is apparent that as work was done in the present case during the year 1875, before any re-location was made, the original claim was continued in force and made operative until there could be another forfeiture by reason of the failure of the owners to do the necessary annual work. The year in which the work was done began on the first of January, 1875, and ended on the 31st of December. The law fixes no time within a year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has gone by. That, in this case, would not be until December 31, 1876, and the work, if completed on

that day, would be just as effectual for the protection of the claim as if it had been done on the first of January previous. It follows that on the 19th of December, 1876, the owners of the original location had, under the act of Congress, the exclusive right to the possession and enjoyment of the property in dispute.

A mining-claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. (Forbes *vs.* Gracey, 94 U. S., 767.) There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exlusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy it was enacted (13 Stat., 441, chap. 67, sec. 9; Rev. Stat., sec. 910) that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, but that each case should be adjudged by the law of possession.

Mining-claims are not open to re-location until the rights of a former locator have come to an end. A re-locator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Locations can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence, a re-location on lands actually covered at the time by another valid and subsisting location, is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done. It follows that the re-location of Belk was invalid at the time it was made, and continued to be so until January 1, 1877.

The next inquiry is, whether the attempted location in December became operative on the 1st of January, so as to give Belk the exclusive right to the possession and enjoyment of the claim after that. We think it did not. The right to the possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made by taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a

valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. As the United States could not at the time give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress. A location to be effectual must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession. As the proceeding to locate is one in which the United States are not directly actors, but is carried on by the locator alone, so that he may take what the United States have, through an act of Congress, offered to give, it is clear that there can be nothing to take until there is an offer to give. Here Congress has said in unmistakable language that what has been once located under the law shall not be re-located until the first location has expired; and it is difficult to see why, if Belk could make his re-location on the 19th of December, he might not on the 19th of January before. (Lansdale *vs.* Daniels, 100 U. S., 116.) The original locators and their grantees had precisely the same rights after the last date as they did after the first, the only difference being in duration. To hold that an entry may be made and the several acts done necessary to perfect a re-location before the former location has expired, will be to encourage unseemly contests about the possession of the public mineral-bearing lands, which would almost necessarily be followed by breaches of the peace.

This brings us to the inquiry whether the possession of Belk, after the first of January, was such as to prevent the defendants from making a valid re-location and acquiring title under it. The position taken in behalf of Belk is, that even if the original locators, or their grantees, had, under the act of Congress, a right to the possession of their claim until January 1, a statute of limitations in Montana would bar an action in their favor against him for its recovery, because they had not been in actual possession within a year previous to his entry, and consequently his entry, though tortious as to them, was good as the beginning of an adverse possession, which, if continued for a year, would entitle him to a patent under the provisions of section 2332 of the Revised Statutes. The statute of Montana relied on is as follows:

"No action to recover any mining-claim, whether placer or quartz, or any quartz lead or lode, or any interests therein or possession thereof, unless the same be held under patent from the government of the United States, shall be commenced or maintained unless that it is proved that the plaintiff, or his assigns, or predecessor in interest, were in the actual seizin or possession of such mining-claim, quartz lead or lode, within one year next before the commencement of such action." * * * (Laws of Montana, 1872, p. 591.)

And section 2332 of the Revised Statutes is as follows:

"Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of

the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of an adverse claim."

The Montana statute was passed January 11, 1872, and the act of Congress, under which both parties claim, on the 10th of May thereafter. Under the act of Congress, as has just been seen, the original locators, or their grantees, had what was equivalent to a grant by the United States of the right to the exclusive possession and enjoyment of the property until January 1. If the Montana statute is in any respect repugnant to this, it was repealed to the extent of such repugnancy by the act of Congress. As between mere possessors, having no other title than such as they got by mere occupancy, an action would undoubtedly be barred by the Montana statute. Whether that would be so in a case where an actual right of possession had been acquired under the act of Congress, is a question we need not consider, as here the controversy is not between Belk and the prior locators. It is clear that, whether an action could be maintained against him or not in Montana, Belk's right of location depended entirely on the act of Congress; and under that, as has already been seen, what he did had no effect as securing to himself the grant of any rights. All he got or could get by his entry was possession, and that, to be of any avail, must be actual.

Under the provisions of the Revised Statutes relied on, Belk could not get a patent for the claim he attempted to locate, unless he secured what is here made the equivalent of a valid location, by actually holding and working for the requisite time. If he actually held possession and worked the claim long enough, and kept all others out, his right to a patent would be complete. He had no grant of any right of possession. His ultimate right to a patent depended entirely on his keeping himself in and all others out, and if he was not actually in, he was in law out. A peaceable adverse entry, coupled with the right to hold the possession which was thereby acquired, operated as an ouster, which broke the continuity of his holding, and deprived him of the title he might have got if he had kept in for the requisite length of time. He had made no such location as prevented the lands from being in law vacant. Others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. There is nothing in Atherton *vs.* Fowler, (96 U. S., 513,) to the contrary of this. In that case it was held a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved, and enclosed the property. Upon that proposition the court was unanimous. We also all agreed that if a peaceable entry had been made on lands which had not been enclosed or improved, a good right might have been secured. The only difference of opinion we had was as to whether the entry in that case was by force or peaceably. A majority of the court thought it was forcible, while the minority considered that the case had been fairly put to the jury on the question of forcible or peaceable entry, and the effect of the verdict was that it had been peaceable.

This brings us to the facts of the present case. No one contends that the defendants effected their entry and secured their re-location by force. They knew what Belk had done, and what he was doing. He had no right to the possession, and was only on the land at intervals. There was no enclosure, and he made no improvements. He apparently exer-

cised no other acts of ownership, after January 1, than every explorer of the mineral lands of the United States does when he goes on them and uses his pick to search for and examine lodes and veins. As his attempted re-location was invalid, his rights were no more than those of a simple explorer. In two months he had done, as he himself says, "no hard work on the claim," and he "probably put two days' work on the ground." This was the extent of his possession. He was not an original discoverer, but he sought to avail himself of what others had found. Relying on what he had done in December, he did not do what was necessary to effect a valid re-location after January 1. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough, as we think, to prevent an entry peaceably and in good faith for the purpose of securing a right under the act of Congress to the exclusive possession and enjoyment of the property. The defendants having got into possession and perfected a re-location, have secured the better right. When this suit was begun they had not only possession, but a right granted by the United States to continue their possession against all adverse claimants. The possession by Belk was that of a mere intruder, while that of the defendants was accompanied by color of title.

It is contended, however, that the court erred in its charge to the jury, because it assumed that the defendants' re-location was good if that of Belk was bad. The notice of the re-location of the defendants was proved by the introduction of the county records; and if we understand correctly the position which is now taken, it is that this notice was defective because of an insufficient affidavit. We cannot find that this precise objection was taken below. When the record was first offered in evidence it seems to have been objected to generally, but afterwards, on a motion to strike it out, the reasons assigned were: 1, that the original was not shown to have been out of the possession or under the control of the defendants; and 2, that the record did not give a sufficient description of the location. As the affidavit to the notice of the re-location of Belk was identical in form with that of the defendants, it is possible such an objection as is now made was not then desirable; but however that may be, we are clearly of the opinion it is one that cannot be made for the first time in this court. The trial below was conducted entirely on the theory that Belk had the better right, because the defendants could not in law make a re-location at the time they did. The court had the right to understand that it was conceded the defendants had perfected their title, if it could be done under the circumstances, and the special objections made to the evidence that was introduced should not be sustained. Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it. When specific objections are made to the admission of evidence, the court has the right to assume that all others are waived, and proceed with the case accordingly. Consequently, when the specific objections made to the introduction of this notice in evidence were overruled, the court had the right to consider it was no longer contended that the requisite notice had not been given and recorded.

This disposes of all the questions raised on the instructions to the jury. It remains to consider the various exceptions taken to the admission and rejection of testimony. These are:

1. As to the admission of the book from the office of the recorder of Deer Lodge county, to prove the record of the location of the original lode-claims by Humphrey and Allison;

2. As to the admission of the books of record from the same office to prove certain deeds by which it was claimed the title of Humphrey and Allison to the original lode-claims was transmitted, in whole or in part, to one Murphy; and,

3. The rejection of the testimony of one McFarland, a witness produced at the trial.

1. As to the proof of the record of the location of the original lode-claim.

As Belk sets up title only as a re-locator of part of the original lode-claim, he impliedly admits the validity of the prior location. There can be no re-location unless there has been a prior valid location, or something equivalent, of the same property. It is nowhere disputed that Humphrey and Allison were the locators and owners of the claim originally. The proof by the record was, therefore, probably unnecessary; but if not, it seems to us the book offered was sufficiently authenticated. It was one of the books of record kept in the proper office and transmitted as such from one officer to another. The original recording appears to have been in a temporary book, and, at a very early date in the history of the county, transcribed by the deputy recorder, under the general supervision of his principal, into the book which has since been recognized as part of the public records of the office. It was sufficiently shown that the original book had been lost or destroyed. This we think enough to justify the use of the present book in its place. Having been recognized as part of the official records of the county almost from the time of the organization of civil government in the Territory, it would be dangerous to exclude it now without any proof of fraud or mistake.

2. As to the deeds. In the view we take of the case, it is entirely unimportant whether the original lode-claim had been transferred or not. The work was done in 1875 by Humphrey, one of the original locators, for the express purpose of resuming the claim. He says it was done under an arrangement which he made to that effect with Thornton, who, according to the deeds put in evidence, was the owner of three-fourths of the property, Humphrey himself owning the rest. It is a matter of no importance to Belk whether the work that was done enured to the benefit of Humphrey alone or to him with others. Without, therefore, considering any of the questions presented in the argument as to the competency of the evidence, or the proper execution of the deeds, we are clearly of the opinion that there is nothing in the assignments of error affecting this branch of the case which requires a reversal of the judgment.

3. As to the testimony of McFarland. He was in effect asked whether any one had that day pointed out to him the line between the National Mining and Exploring Company's ground and the defendants'; and, if so, whom; and if he knew where the line was. There was but one question, and the objection was made to the question. It was entirely im-

material, so far as anything appears in the record, whether any one pointed out the line to the witness or not, unless it was some one connected with the suit or the parties. It is true, if he knew of his own knowledge where the line was he might tell, but in the form the question was put he could well think he would be permitted to tell where it was as it had been pointed out to him. The question was clearly too general, and on that account objectionable. It is quite possible the witness knew facts that were material to the issue which was being tried. If he did, and the plaintiff desired to have them, the question should have been made more specific, and the objections to the form of that which was put removed.

Upon a careful consideration of the whole case, we find no error; and the judgment is affirmed.

## UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

### VAN ZANDT *vs.* ARGENTINE MINING COMPANY.

*Mining-claim—Defective location certificate may be amended—Paper title.*—When there is conflicting evidence touching the facts necessary to make valid the original location of a mining-claim, the paper title of grantees claiming under the original locator will go to the jury. A location certificate which is fatally defective, in omitting reference to natural object or permanent monument, may go to the jury in connection with an amended certificate correcting such defect.

*Practice—Amendment at the hearing.*—Plaintiff having declared for the entire property, it was developed on the trial that in consequence of a defective deed, he had title to only two-thirds of the claim; *Held*, that plaintiff could not, on this declaration, recover for two-thirds, and that the person holding title to the other third of the claim might not, without his consent, be joined as party plaintiff, yet plaintiff might amend his complaint so as to demand but two-thirds.

*Mining-claim—Pre-requisites to location.*—Under the statutes, Federal and State, no location of a mining-claim shall be made until the discovery of a vein or lode within the limits of the claim; and a discovery-shaft must be sunk thereon to the depth of at least ten feet. The mineral or ore so discovered must be in position—in the form of a lode—and not in a broken and fragmentary condition, intermingled with slide and *debris* on the surface. Discovery of ore after location, in a different part of the claim, will not avail.

*The burden*—Is on the plaintiff to establish the fact that ore was so found in his discovery-shaft, and that the same lode is continuous to the ground in controversy.

*Evidence, what shall be, of prior location.*—Proof of the date of plaintiff's location, the others not being shown, and the fact that plaintiff's location is excepted from defendant's patents, will raise a presumption that plaintiff's location was first made.

*The top or apex, on a junior discovery—Senior location on the "dip" will hold.*—Ordinarily the owner of a mining-claim in which is found the top or apex of a lode may follow the vein within or without his side lines on its "dip" to any depth; yet if the same vein has been previously discovered and located on the "dip," such discovery will prevail against a junior discovery, though located on the apex of the vein.

Action to recover possession of the Adelaide mining-claim, in California district, Lake county, Colorado.

Plaintiff offered evidence to prove that the claim was located by Walls and Powell, in the year 1875. As to marking the boundaries of the claim on the surface of the ground, and the finding of valuable ore in the discovery-shaft, the evidence was slight; and defendant objected to plaintiff's record title, on the ground that these facts were not shown. As there was some evidence on both points, the court held that the paper title should be received. In the original certificate of location the description of the claim contained no reference to a natural object

or permanent monument; but this was corrected in an amended certificate, and both were received, although it was held that the first was fatally defective.

Having declared for the entire interest in the claim, plaintiff failed to show title from the original locators to an undivided one-third interest. One of the deeds upon which he relied was not sufficiently proved, and upon defendant's objection it was excluded. Thereupon he moved for leave to make the grantor in that deed, in whom the title to the said one-third interest would rest, (assuming that instrument to be void,) a party plaintiff in the suit.

And this was denied by the court:

*First.* Because the deed, for aught that appears, was effectual between the parties to it to transfer the property; and,

*Second.* A stranger should not be made a party to the suit, without his knowledge and consent, which is not shown.

Plaintiff then suggested to the court, that upon his declaration for the whole interest, he could take a verdict for two-thirds, pursuant to sixth paragraph of section 251 of the Code of Procedure of the State. But the court was of the opinion that section 249 of the code, which requires the plaintiff to state the interest claimed by him, should control, and that plaintiff having declared for the whole, could not recover an undivided interest. Nevertheless, the plaintiff was allowed to amend his complaint at the trial so as to demand but two-thirds interest, and the court said that this was often done. For, the plaintiff having at first asked judgment for the whole, the defendant cannot now be surprised that he asks only a part.

In the further trial of the cause it appeared that the defendant claimed under two locations, called the Camp Bird and Pine, which it held by patent from the government. Plaintiff's claim is in the general course north and south, or, to be exact, north 33° 10′ east. Defendant's two claims, overlapping the other somewhat transversely, are in the general course east and west. The contesting claims have the relation of the jaws of shears, and the ground in controversy is that included in the space of intersection, and a small part of the Adelaide claim immediately north of the intersection. The discovery-shaft of the Adelaide claim is or was at the north end of the claim, and some 300 or 400 feet from the ground in controversy. By later operations, and the erection of a mill and ore-house in the vicinity, it had been filled, and the position of it in the claim was not *very* well shown. Between this shaft and the ground in controversy there were no openings to prove that the lode extended in that direction, and whether it did so extend was strongly controverted. Defendant gave evidence to prove that no mineral was found in the discovery-shaft, and that the condition of the ground was such that if any was found there it was broken and fragmentary, or in other words, of the character of float, mixed with the slide on the surface of the mountain. It appeared, however, that plaintiff and his grantors had maintained possession of the premises from the first; had made valuable improvements on the claim, and had carried on extensive mining operations at and near the ground in controversy.

The Camp Bird and Pine discoveries were west of the ground in controversy 200 or 300 feet, and, as defendant contended, on the top and

apex of the lode, which at that point extended almost directly across those locations. The defence, by answer, to the support of which many witnesses were brought into court, was that the ore in controversy was a part of the vein which defendant held by its top and apex. If what has been said to explain the position of the claims is intelligible, it will be apparent that in this view the Adelaide location extended across the vein and on its dip, below the top and apex, which was to the west of that location. And as the Adelaide location was first in time, it became a question whether a location so made and otherwise sufficient would be valid against a junior location on the top and apex of the vein. This having been ruled as expressed in the charge to the jury, much testimony as to the top and apex of the vein, and the continuance of the vein to the ground in controversy, was withheld, and the case stood on the validity of plaintiff's location—

Whether a vein *in place* was found in the discovery-shaft of that location; and

Whether the vein, if found there, extended to the ground in dispute.

The court charged the jury as follows, (Hallett, J.:)

The question to be determined on the evidence relates to the plaintiff's location, which he calls the Adelaide.

As to the work on the ground necessary to a valid location, the statute of the State provides, among other things, that a discovery-shaft shall be sunk to the depth of at least ten feet, or deeper if necessary, to find a well-defined crevice. And the Federal statute declares that no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located.

The position of the plaintiff is, that Walls and Powell, the locators of the Adelaide claim, found a lode or vein in the discovery-shaft sunk by them, and that position is controverted by defendant. I do not recall anything said by witnesses as to a crevice in that shaft; but there is some testimony to the effect that ore-bearing silver was found there. If you find from the evidence that such ore was taken from the Adelaide discovery-shaft, it is important to consider whether it existed in mass and position; or, in other words, in the form of a vein or lode; or, on the other hand, in a broken and fragmentary condition, intermingled with the slide and *debris* on the surface of the mountain. For it rests with the plaintiff to show that ore was found in the discovery-shaft, and also that the same body, vein, or lode extends to the ground in controversy. Of course, if ore was found in the discovery-shaft, and the ore so found was broken and fragmentary, it cannot be said that a body of ore—a vein or lode—was found in that shaft which extends to the ground in dispute.

So that, if you find that no ore was discovered in the discovery-shaft of the Adelaide claim, or, if ore was found in that shaft, and it was broken and fragmentary, your verdict will be for the defendant.

And in this view, (that is, assuming the facts to be as stated,) the circumstance that plaintiff's grantors afterwards developed the body of ore in controversy higher up the mountain side, will not affect the result. For a location rests on what may be found in the discovery-shaft. And if nothing is found there, or if what is found there does not extend beyond the limits of the shaft, the discovery of a body of ore elsewhere in the claim will not avail.

But if a vein or lode was found in the discovery-shaft of the Adelaide claim, and it extends throughout the ground in controversy, the plaintiff may prevail.

Something has been said as to whether the locators complied with the other provisions of the statute, relating to posting notice of the discovery on the claim, staking the boundaries, all of which must be shown in evidence to constitute a valid location.

If you find these things to be proved, and that a vein or lode was found in the discovery-shaft, the question remains, whether such vein or lode extends to the ground in controversy. Upon the evidence here, it may come to the point whether the lode of ore found in the several shafts on the hill was also found in the discovery-shaft of the Adelaide claim. Nevertheless, if you believe from the evidence that a vein or lode was found in the discovery-shaft, and that it is not the same as the vein or veins found in the shafts on the same claim, higher up the hill, but that it extends throughout the claim, the plaintiff may prevail.

This being shown, although defendant's location may appear to you to be along the line of the top, apex, or outcrop of the vein, they cannot prevail against a senior location on the dip of the lode. That plaintiff's location is of earlier date than either of defendant's may be assumed upon two grounds: First, the date is shown as August, 1876, and in the absence of evidence we cannot presume that the others are of earlier date. Second, in the patent put in evidence by defendant, the Adelaide surface-ground is excepted from the grant. This may be *prima facie* evidence that the Adelaide claim is of older date than the others; but it is not evidence of anything more.

In taking the patents in that form there was no recognition of the plaintiff's right, or the validity of the Adelaide claim; nor is the defendant in any way precluded thereby from contesting that claim.

The exception in the patent to the Pine claim, to which reference has been made by counsel, does not in any way relate to the matters in controversy here. It should not have any weight whatever with you. The matters in issue are as herein stated, and you will determine them according to the rules now given you, and by the preponderance of evidence. The burden is on the plaintiff to establish every material fact, as hereinbefore declared.

The jury returned a verdict for plaintiff.

## SUPREME COURT OF THE UNITED STATES.

### CAMPBELL *vs.* RANKIN.

*Affidavit for continuance.*—An affidavit for the continuance of a cause does not become a part of the record, so that effect can be given to it during the trial, unless it is properly introduced as evidence for some legitimate purpose by one of the parties.

*Trespass.*—In trespass *quare clausum fregit*, actual possession of the land by the plaintiff, is sufficient evidence of title to authorize a recovery against a mere trespasser.

*Parol evidence.*—The judgment of a court of competent jurisdiction is, as to every issue decided in the suit, conclusive upon the parties thereto, and in a subsequent suit between them parol evidence, whenever it becomes necessary in order to show what was tried in the first suit, is admissible.

*Evidence of priority of possession.*—While the record of a mining-district is the best evidence of the rules and customs governing its mining interests, it is not the best or the only evidence of the priority or extent of a party's actual possession.

*Evidence of title.*—The fifth section of the act entitled "An act to promote the development of the mining resources of the United States," approved May 10, 1872, (17 Stat., 91,) gives no greater effect to the record of mining-claims than is given to the records kept pursuant to the registration laws of the respective States, and does not exclude as *prima facie* evidence of title proof of actual possession, and of its extent.

Error to the supreme court of the Territory of Montana.

Mr. Justice Miller delivered the opinion of the court. The declaration avers that plaintiffs below, who are also plaintiffs in error, were the owners of a mining-claim in Meagher county, known as claim No. 2 below discovery, in Green Horn Gulch, and that defendant wrongfully entered upon and took possession of a portion of said claim, and took and carried away large quantities of gold-bearing earth and gold dust, the property of plaintiffs, of the value of $15,000.

The answer amounts to a general denial of all the averments of the complaint.

Bills of exception taken on the trial show that plaintiffs offered in evidence the record of a judgment in the same court, in which the defendant in this suit was plaintiff, and the present plaintiffs and those under whom they claim were defendants, which was an action for trespass, wherein the same question of conflicting interference of the two mining-claims was in issue, and the verdict and judgment were for plaintiffs in this suit.

The admission of this record was objected to, and the court sustained the objection.

Plaintiffs then offered to prove that they had been in actual possession of claim No. 2, in Green Horn Gulch, for several years, and that defendants had admitted in conversation the existence of such claim, and had conceded a dividing line between his claim and that of plaintiffs, which would give to the latter the ground in controversy. The court refused this also.

Plaintiffs then offered in evidence a deed from Harding and Wilson for claim No. 2, Green Horn Gulch, dated December, 1869, and proof of occupancy and use of it ever since. The court rejected this also; and having rejected all the evidence offered by plaintiffs, it directed the jury to find for defendant, and on that verdict rendered a judgment, which was affirmed on appeal by the supreme court of the Territory. The record sufficiently shows that neither party to this suit had any legal right to the *locus in quo* from the United States, and that the controversy involves only such possessory right as the act of Congress recognizes in the locator and occupant of a mining privilege. Since this right of possession was the matter to be decided by the jury, it is almost incomprehensible that proof of prior occupancy, and especially when accompanied by a deed showing color of right, should be rejected.

In actions of ejectment, or trespass *quare clausum fregit*, possession by the plaintiff at the time of eviction has always been held *prima facie* evidence of the legal title, and as against a mere trespasser it is sufficient. (2 Greenl. Evid., sec. 311.) If this be the law, when the right of recovery depends on the strict legal title in the plaintiff, how much more appropriate is it as evidence of the superior right of possession under the acts of Congress which respect such possession among miners.

If this plain principle of the common law needed support from ad-

judged cases, as applicable to the one before us, it may be found in the courts of California, in Atwood *vs.* Fricot, (17 California, 37;) English *vs.* Johnson, (17 California, 107,) and Hess *vs.* Winder, (30 California, 355.)

The court below erred, therefore, in rejecting this evidence of plaintiff's prior possession.

Whatever may have been the opinion of other courts, it has been the doctrine of this court in regard to suits on contract ever since the case of the Washington, Alexandria, and Georgetown Steam Packet Co. *vs.* Sickles, (24 Howard, 333,) and in regard to actions affecting real estate, since Miles *vs.* Caldwell, (2 Wall., 35,) that whenever the same question has been in issue and tried, and judgment rendered, it is conclusive of the issue so decided in any subsequent suit between the same parties; and also that where, from the nature of the pleadings, it would be left in doubt on what precise issue the verdict or judgment was rendered, it is competent to ascertain this by parol evidence on the second trial. The latest expression of the doctrine is found in Cromwell *vs.* County of Sac, (94 U. S., 351;) Davis *vs.* Brown, (94 U. S., 423.)

The rejection of the record of the suit of Rankin *vs.* Campbell and others, was in direct conflict with this doctrine. In that case Rankin had brought an action of the same character as the one he is now defending, against the parties who are now plaintiffs, and had a verdict and judgment against him. The record in that case, as in this, shows that one party claimed under mining-claim No. 2, in Green Horn Gulch, and the other under mining-claim No. 8, in Confederate Gulch. The issue in both cases was to which claim did the disputed piece of mineral deposit belong; and if that issue was not clear, it was competent, under the decisions we have cited, to show by parol proof that the controversy was over the same locality, and that the issue had, therefore, been decided against Rankin.

And this proof the plaintiffs offered, in connection with the record of the former suit. The exclusion of this evidence was error.

The principal ground on which the court rejected all this evidence, and all other evidence offered by the plaintiffs, is, that at the same term of the court, and before the trial, one of the plaintiffs, in support of an application for a continuance, made an affidavit, in which he stated that he expected to prove by an absent witness that he had destroyed the original record and laws of Green Horn Gulch, in which the plaintiffs' claim is located; that said records and laws established the size, lines, boundaries and location of claim No. 2 below discovery in said gulch, and that said records showed that the predecessors of the plaintiffs in interest possessed and occupied this claim in accordance with the local rules.

This affidavit, made in support of an application for continuance, which was overruled, the judge, of his own motion, treated as part of the record, and as before him on the trial, though not offered by either party; and, as well as we can understand it, excluded all other evidence of the possession, and location, and validity of the plaintiffs' claim, because this lost record was the best evidence, and all other was secondary or inferior.

It is difficult to argue this proposition seriously. The affidavit was in no judicial sense before the court on the trial, and could only be used, if at all, when introduced by one of the parties for some legitimate pur-

pose. If it had been so presented by the defendant, it plainly showed that this better evidence was destroyed and could not be produced, and was a sufficient foundation for the use of secondary evidence.

But the local record of a mining community, while it may be and probably is the best evidence of the rules and customs governing the community, and, to some extent, the distribution of mining rights, is not the best nor the only evidence of priority or extent of actual possession. It may fix limits to individual acquisition, the terms and rules for acquiring and transferring mining rights, as the laws of the State do in regard to ordinary property; but such rules and customs no more determine who was the first locator, or where he located, than any other competent evidence of that fact.

Whatever may be the effect given to the record of mining claims under section of the act of Congress, approved May 10, 1872, (17 Stat., 92,) it certainly cannot be greater than that which is given to the registration laws of the States; and they have never been held to exclude parol proof of actual possession and the extent of that possession as *prima facie* evidence of title.

The supreme court of the Territory argue that the trial court can regulate the order of admission of evidence in a case, and because the plaintiffs did not introduce first of all proof of their mining records which were lost, nothing else could be introduced. For want of these, evidence of actual possession, of title-deeds, of the location of the claim, and the record of the former suit determining the rights of the parties to the *locus in quo*, were all unavailing and inadmissible.

We know of no rule of law which justifies this action.

The judgment of the supreme court of Montana will be reversed, and the cause remanded to that court with directions to order a new trial; and it is so ordered. (9 Otto, 261.)

## UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

### JOHNSTONE *vs.* ROBINSON *et al.*

*Prospecting for mines—"Grub stake"—Arrangement must exist at the time of discovery, to give joint interest.*—The partnership association, or association between parties who may be engaged in prosecuting explorations in the public lands for mines, must exist at the time of the location and discovery in order to give the parties, other than the discoverer, an interest in the property.

*Same—Abandonment of contract.*—A made an agreement with B, by which the latter was to take care of the former for the winter, and furnish outfit in the spring, when A should go prospecting on their joint account. B at least partially complied with the agreement, by keeping A for the winter, and furnishing some money in the spring. But before making any discovery or search for mines, under this arrangement, A made a new arrangement with R, by which the latter furnished the "outfit," and the former did the prospecting; under this last arrangement the mines were discovered: *Held*, that the making of the arrangement with R was an abandonment of the agreement with B, and that the latter cannot share in the interests of A in the property discovered and located under the new arrangement.

Hallett, Judge, orally:

Sarah E. Johnstone, a married woman, and Mary A. and Ellen W., her infant children, filed a bill in the district court of Arapahoe county, against the unknown heirs of Charles Jones, to compel the conveyance of certain interests in mining property in the county of Summit. Afterwards, George B. Robinson and the Robinson Consolidated Mining Com-

pany, who had acquired Jones' interest in the property, were made parties to the suit. On the death of Robinson, his heirs, and perhaps his personal representatives, were substituted for him as defendants, and the bill is now pending against those parties.

The theory of the case, as advanced in the bill, is that Mr. Jones, having been engaged with Mrs. Johnstone's husband in the San Juan country, in the year 1877, in prospecting for mines, agreed with Mrs. Johnstone that if he should be brought out to Denver by her or her husband, and kept here during the ensuing winter, and furnished with an outfit for prospecting in the spring, that he would give to her and her children one-half the property which he should acquire during the summer, or that they should be interested with him in some partnership relation to the extent of one-half of what he should acquire during the summer.

It is alleged in the amended bill that all these things were done; that is to say, that Jones was brought to Denver and kept during the winter, and furnished with the necessary outfit in the spring, and in the course of the summer that he acquired the property in which the plaintiffs claim to have an interest, and which they wish to have decreed to them in this suit.

There is some evidence to show that Jones was brought to Denver, pursuant to the agreement, and kept here during the winter by Mr. Johnstone. It may be assumed that the fact is proved, and as to furnishing him with an outfit in the spring, there is testimony that some money was given to him at the time when he was about to start to Leadville, the amount of which is not shown; also some blankets, and perhaps some clothing. It is not claimed that anything more was furnished him—provisions or tools or animals, if any were necessary. As to that matter, then, it may be said that the proof is not full, does not establish a compliance by the plaintiff, Mrs. Johnstone, or her husband, with the agreement.

Jones went on to Leadville, and there, after something of a spree, and idling around for some time, and making similar arrangements as to prospecting with at least two other parties, he went out in the interest of Mr. Robinson, or parties who were associated with Robinson, he himself being one of them, in an effort to discover mines. The mines in controversy here were discovered some time during the summer, Jones having in the discovery, by the terms of the agreement with Robinson and others, an interest of one-fourth, or something like that, in the location so made.

It is to secure one-half of that interest so acquired by Jones under an agreement with these other parties, not with the plaintiffs in this suit or any of them, but with other parties, that this suit is prosecuted. Jones died in the autumn of that year, and the bill was brought against his unknown heirs, these other parties becoming defendants afterwards.

Upon that statement of facts, I deem it only necessary to say that, in my view, the partnership relation—or if it be not called a partnership relation, but by some other name—the association between parties who may be engaged in prosecuting explorations in the public lands for mines, must exist at the time of the alleged discovery and location, in order to give to the parties associated an interest in the property. If it does not

then exist, so that the person acting in the field, making the discovery and the location, can be said to be acting for the others as well as himself, no interest can be acquired by those who are not personally present. Complainants' counsel seem to have felt the force of that rule, and they sought to establish the existence of this relation by Jones' admissions made by him at different times through the year, to the effect that he expected to give some interest to Mrs. Johnstone and her children, or that they held some interest as discoverers. But that, I think, is not sufficient. Conceding that such admissions may have been made—and I think the evidence establishes that they were made—that is not sufficient to overcome the strong circumstances of the case. Mr. Jones had agreed with other parties, whose names I do not now recall, to go upon a prospecting expedition for them, or to allow them to stand in interest with him. He was a man of dissipation, and, as shown by the evidence here, in the habit of drinking about all the time when he could find anything to drink that would produce drunkenness, and for that reason I should say that not very much importance is to be attached to his statements.

But if we should give the greatest weight to them, the weight that would be attached to the declarations of a sober man, of deliberate ways and habits of mind, I doubt whether it could be said that one having made one arrangement or agreement with certain parties to act with them in securing mines, and afterward making another agreement with other parties, and going apparently in pursuance of the last agreement, with the means furnished by his latest associates, could be said to be acting under and in pursuance to the first agreement. I do not believe that inference would be a fair one. If several persons associate themselves together by agreement to go out and discover mines, and some of them furnish the means of prosecuting the enterprise, as provisions and tools, and the like, and others go out and contribute their labor, and each party performs his part of the agreement according to its terms, it is clear enough from the conduct of the parties, as well as their declarations, that they are acting in fulfilment of their contract and agreement, whatever it may be; but when this agreement is apparently abandoned, and some new arrangement is made between new parties, and means are furnished by some of them as arranged in the first instance, and others go out in the prosecution of the joint enterprise, any one would say upon that circumstance alone, that they are acting under and in pursuance of the last agreement, and not the first. And that is the situation of affairs here. I do not think that it is open to discussion, even, that Mr. Jones, at the time he made these discoveries, was acting under his arrangement with Mrs. Johnstone. He had abandoned that, as he abandoned everything else, apparently, within a day or two after it was made, and taken up with this new idea, with the people who came to him last, and furnished the necessary articles for prosecuting his enterprise. His acquisitions during this time, as he got only a small interest in the property, must be taken to have been made for himself, and these plaintiffs were not interested in them at all; and whatever remedy they would have against him or his representatives for his breach of contract, they would have no right whatever to the property which he might acquire when acting under this new arrangement, this new agreement with Robinson and his associates.

That is the strong reason in my mind which will enforce a decree for the defendants in this case.

The bill will be dismissed, and the defendants will recover their costs.

UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

HARRIS *vs.* EQUATOR MINING AND SMELTING COMPANY.

*Mining-claim—Possession—Location—Ejectment.*—Though plaintiffs, who sue in ejectment for the possession of a mining-claim, may not be able to show a valid location according to the mining laws in force at the time, yet they may recover if they can show that they were in possession, holding and claiming under color of title, at the time the defendant entered. And such recovery will extend to the entire claim, and not merely to the actual area occupied.

*Purchaser and locator—Distinction between.*—The purchaser of a mining-claim may occupy a position different from the locator—not as against the General Government, against which nothing can avail but strict compliance with the law regulating locations—but, against other citizens seeking to locate the same ground, it may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which in time, under the statute of limitations, will ripen into a perfect right. And it seems reasonable to allow him to maintain his possession against one who seeks only to initiate a new claim to the same thing.

*Estate in mining-claim.*—The circumstance that a miner's estate in public lands is subject to conditions on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property, as that it may be conveyed by deed, is subject to sale on execution, descends to the heir, and not to the administrator, etc.

*Deed—Boundaries in.*—Though a deed does not describe the property conveyed by metes and bounds, yet, if it makes reference to a location certificate of record which contains a full and definite description of the claims, this is the same as if the description had been given in length in the deed. It matters not that the location certificate be not shown to be regular in all respects, if it gives a correct description of the property.

Ejectment to recover possession of the Ocean Wave lode, situate in Griffith mining district, Clear Creek county, Colorado. Trial in May term, 1881, and verdict for plaintiffs. Motion for new trial then made and submitted. Decided at October term, 1881.

Hallett, J.:

Defendant applied in the land-office at Central City to enter the Charlotte lode, and plaintiffs made adverse claim to a part of the territory as the Ocean Wave, and brought this suit in support of their claim. The claims overlap near the ends, and the area in dispute is not very large. The Ocean Wave is something more than ten years older than the other location, and a tunnel has been run nearly the whole length of the claim. At the trial there was evidence to show that the lode was discovered in the year 1867, and that work had been done in the tunnel from time to time thereafter, until this suit was brought. Very little ore was taken from the tunnel, but several witnesses testified that the lode was well defined and clearly traceable throughout the length of the tunnel. An attempt was made to show a valid location, according to the law in force in 1867, and plaintiffs also relied on a re-location in 1875. In this plaintiffs were not successful, and they were at last forced to rely on possession only in themselves and their grantors as evidence of title. As to the matter of possession, it was shown that the tunnel was worked from time to time, and by different parties, from the date of the discovery in 1867 until this suit was brought. Some of the parties in

possession, and others who were not in possession, had conveyed parts of the claim, or an interest therein, to other parties named; but, as plaintiffs were unable to connect themselves with these conveyances, they were not received. One conveyance made by a master in chancery, under a decree of court, in Clear Creek county, was, however, received under the circumstances which will now be stated:

In the year 1875, and for some time prior thereto, the Leavenworth Mountain Mining and Tunnelling Company was in possession of the property, and had done some work in the tunnel. They had erected buildings at the mouth of the tunnel, and appeared to have and hold undisputed possession, but whether under claim of title was not shown. In this situation of affairs, one James M. Estelle brought suit against that company in the district court of Clear Creek county, and in June, 1876, obtained a decree for the sale of the premises, to satisfy several amounts of money in the decree mentioned. The premises were sold under the decree to Estelle and Morrison, and in due time a deed was made to Estelle, Morrison having assigned to him his interest in the purchase.

Several plaintiffs claim by descent, and others by purchase from Estelle; and there was evidence at the trial tending to prove that they, or persons in their interest, were in possession of the Ocean Wave at the time the Charlotte lode was located, in October, 1879. Upon these facts a question was presented at the trial, whether the plaintiffs, not having shown a valid location of the Ocean Wave, could claim anything in virtue of their possession of the ground in controversy, if the jury should find that they held possession at the date of the Charlotte location. And it was conceded, that as to the tunnel itself, and the area covered by the buildings of the plaintiffs at and near the mouth of the tunnel, their right could not be denied. But it was contended that nothing less than a valid location could give to them a possession beyond their actual occupancy to the full extent of a claim 1,500 feet in length by 150 feet in width. Upon a familiar principle, it was said, a locator of a mining-claim on the public lands is required to conform to the statute and the local rules of the mining-district in which his claim may be situated, in order to establish his right to a full claim, and that a grantee of the locator should be held to the same proof. This, however, embraces something more than the principle, that the title to and the right to occupy the public mineral lands can only be acquired in the manner prescribed by law. Conceding that proposition, it does not follow that a locator in actual occupancy, who has been evicted by a wrong-doer, must give evidence of every fact necessary to a valid location in an action to recover possession. Not on the ground that the essentials of a valid location are in any case to be omitted; but that, in support of undisturbed possession, long enjoyed, a presumption may in some cases arise that the location was at first well made. The statute of limitation, enacted by the State and recognized in the act of Congress, is founded on this principle. If, in this State, the practice in ejectment for mining-claims has been to show all the steps of a valid location in cases of actual occupancy and possession in the plaintiffs, it has never been declared that such proof is in all such cases indispensable.

It is not necessary, however, to discuss the point at length; for it is

clear that a purchaser may be in a different position from the locator of the claim, not as against the General Government, with which nothing can avail but strict compliance with the law regulating locations, but as against other citizens seeking to locate the same ground, it may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which in time, under the statute of limitation, will ripen into a perfect right. And it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so, the regulations respecting locations are not at all relaxed, nor is any condition on which the estate is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property, as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant, and not the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property. This view is accepted in California, and I have not found any authority against it. Atwood *vs.* Fricot, (17 Cal., 38;) Hess *vs.* Winder, (30 Cal., 349.)

The deed from the master in chancery to Estelle does not give the boundaries of the claim, without which, according to the authority cited, it would have no effect to extend the possession of plaintiffs beyond the parts actually occupied by them. But reference is made to a location certificate of record, which contains a full and definite description of the claim, which is the same as if the description had been given in the deed. It matters not that the location certificate was not shown to be regular in all respects. If it gives a correct description of the property, such description is, by reference, incorporated in the deed.

The charge to the jury, of which defendant complains, was in substance, that possession of the Ocean Wave by plaintiffs at the date of the Charlotte location should extend to the limits defined in the master's deed to Estelle, and would defeat an adverse location during such possession. This, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence. The proposition, as stated, is believed to be correct, and the motion for new trial will be denied.

## SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

### SPIEGELBERG *vs.* CLARK.

*Possession.*—Possession may be by principal or agent, or it may be shown by legal location and the subsequent doing of required acts and the absence of acts or omissions indicating abandonment.

*Value of assessment work—How evidenced.*—Nine suggestions or classes of testimony are presented for proving the value of assessment work or annual labor performed on a mining-claim

Charge of Chief Justice L. Bradford Prince.

### POSSESSION.

This is an action under what is called the forcible entry and detainer

law. The plaintiffs allege in the complaint that on the 1st day of Jan., 1882, they were in possession of a mining-claim known as the "Bourbon," in the Cerillos mining district, and that the defendants on said day by force, fraud, and stealth entered upon said claim and detained and held possession thereof against the plaintiffs.

In actions of this kind the question of the title to the premises in question cannot be considered; the case depends entirely on possession, not title. It can only be successfully brought by the person or persons in possession of the premises at the time of the alleged entrance.

The first question then for you to consider is whether the plaintiffs were in possession on the first day of January, 1882.

The facts necessary to constitute possession differ in accordance with the different character of the property possessed. Thus in the case of a mining-claim, no acts are required as evidence of possession, other than those usually performed by the owners of such claims. A miner is not expected to reside on his claim nor build on it, nor cultivate it, nor enclose it. The character of the possession necessary on mining-claims will vary with the nature of the mines, the mode adopted in working them, and sometimes with the character of the country.

In a case of this kind the possession of the plaintiffs may be either by actual occupancy by themselves or agent, at the time of the entry complained of, or it may be shown by location in accordance with law, and the subsequent doing of all acts required by law and legal regulations, for the holding of a mining-claim, and the absence of any acts or omissions showing an abandonment on their part of the claim in question.

If you believe that the plaintiffs legally located the Bourbon claim in 1879, and during 1880 and 1881 performed the labor or made the improvements required by the statutes and lawful local regulations, and have not in any way abandoned it, then they were in possession thereof, for the purposes of this action on the first day of January.

ANNUAL ASSESSMENTS.

It was conceded during the trial that the proper amount of work was done in 1880. As to the legality of the location in 1879, you are to decide from all the evidence before you on that subject.

The greater part of the testimony in this case has been with regard to the amount of work and improvements done in 1881, and as this is a question of great importance, I will state to you the law with regard to it, as I understand it, with some particularity:

The words of the statute are as follows: "On each claim located after the 10th of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." By a subsequent act the years for this purpose are the calendar years, commencing each January 1 and ending December 31.

The question for you to decide, as to this, is whether there has been an actual performance of labor or making of improvements on the claim, of the fair and reasonable value of $100 during the year 1881.

In order to assist you in arriving at a conclusion on this point the court has allowed testimony to be introduced of every kind which bears on the subject and could aid you in determining whether labor and im-

provements to the value stated were really put upon the property or not.

Among the classes of testimony which have been produced before you are the following:

1. The number of days of labor performed on the mine in question.

2. The usual and customary rate of wages per day for similar labor, in the vicinity, and at the time of the performance of this labor.

3. The amount and character of the work performed, giving particulars and items, including number of feet of shaft or drift, kind of rock, and earth in which the work was done, etc.

4. The usual and customary price of work of similar character in that vicinity, and at the time of the performance of that work.

5. As one way of proving such usual and customary price, testimony as to the usual and customary amount of work done for $100 in the vicinity, and at the time.

6. The opinion of experts who examined the work itself as to the fair and reasonable value per foot of the work actually done in the mine in question.

7. The opinion of like experts as to the time absolutely required for the performance of that work.

8. The fair and reasonable value of the work actually done in the mine in question.

9. The amount actually paid for the work and improvements actually done on the mine in question.

In arriving at a conclusion as to the fair and reasonable value of the labor and improvements in question, you can take into consideration all of this evidence. The different elements of proof just mentioned are produced as aids to your determination; none of them as conclusive in itself.

The intention of the United States law on this subject is wise and beneficient. It is to give to every citizen the right of possession of a limited portion of the public domain of the United States, containing valuable mineral, so long as he develop the same; but not to allow him to hold it, to the exclusion of others, unless he does so develop it.

For this purpose the law requires, as we have seen, that each possessor of a mineral claim shall in each year have labor or improvements put upon such claim of the worth of not less than $100.

What is required is that the claim-owner shall in good faith have such work or improvements done to the *reasonable or fair value of* $100. On the one hand it would not be conclusive in favor of the possessor that the evidence showed that he had paid $100 for the work done, if it also appeared that by collusion or fraud or neglect, or otherwise, an amount of work considerably less than that sum in fair value had been actually performed. On the other hand it would not be conclusive as against the owner if the evidence showed that there might have been some one in the vicinity who would have been willing to do the work performed for somewhat less than $100, if $100 was a reasonable and fair price therefor at the time.

We are to take into consideration all the facts and the opinions of experts in evidence before you, and from them come to your conclusion as to whether the law has been complied with by the performance of labor

or making of improvements on the mining location in question, of the fair and reasonable worth of $100 during the year 1881.

## SUPREME COURT OF THE UNITED STATES.

### ST. LOUIS SMELTING AND REFINING COMPANY *vs.* KEMP.

*Patent—How impeached.*—A land patent, in a court of law, is conclusive as to all matters properly determinable by the land department when its action is within the scope of its authority. On the other hand, a patent may be collaterally impeached in any action by showing that the law did not provide for selling the lands or that they had been reserved from sale or dedicated to special purposes or had been previously transferred to others.

*Mining-claim—Location—Mining patent.*—A mining-claim is a parcel of ground containing precious metals in its soil or rock. A location is the act of appropriating such parcel according to established rules. A mining-claim may include one or several locations. A separate patent on each location is not contemplated by the mining statutes.

Error to the circuit court of the United States for the district of Colorado.

### STATEMENT.

This was an action at law for the possession of a parcel of land in the city of Leadville in Colorado. It was commenced in one of the courts of that State, and on application of the defendants was removed to the circuit court of the United States for the district. The plaintiff is a corporation created under the laws of Missouri. The complaint is in the usual form of actions for the possession of real property under the practice obtaining in Colorado. It alleges that the plaintiff was duly incorporated under the laws of Missouri, with power to purchase and hold real estate; that it was the owner in fee and entitled to the possession of the premises mentioned, describing them, and that the defendants wrongfully withheld them from the plaintiff to its damage of five thousand dollars.

The defendants filed an answer to this complaint, in which they admitted that the plaintiff was incorporated as averred, but denied that it was the owner in fee of the demanded premises, or that the premises were wrongfully detained from its possession, or that it had sustained any damage. They also set forth the certificate of the incorporation of the plaintiff, and alleged that as a foreign corporation it was incompetent to acquire title to any real estate in Colorado, except such as might be necessary for the transaction of its business as a smelting and refining company, and that the premises in controversy were not necessary, and were not acquired for that purpose, but for speculation.

To this answer the plaintiff filed a replication, in which, after denying its incompetency to hold real estate as alleged, it averred that it was authorized, under the laws of Missouri, to buy, sell, and deal in real property for any purpose whatever, and that the property in controversy was acquired as a site for smelting and reduction works, and that such works were afterwards erected upon it and used for reducing and smelting silver ores.

The case was tried at the circuit in November, 1879. To maintain the issues on its part the plaintiff offered in evidence a patent of the United States to Thomas Starr, dated March 29, 1879, for mining-ground which it was admitted included the premises in controversy. The patent recited that pursuant to provisions of chapter six of title

thirty-two of the Revised Statutes, there had been deposited in the General Land Office the plat and field-notes of the placer mining-claim of Thomas Starr, the patentee, accompanied by a certificate of the register of the land-office at Fairplay, Colorado, within which district the premises are situated; that Starr had, on the 6th of March, 1879, entered an application for the said claim, which contained one hundred and sixty-four acres of land, and sixty one-hundredths of an acre, more or less. The patent also specified the boundaries of the tract in full according to the field-notes, and contained the recitals and words of grant and transfer which are usually inserted in patents of the United States for placer mining land. To the introduction of this patent the defendants objected, but it is not stated in the record on what ground the objection was founded, and it was overruled. The patent was accordingly admitted in evidence, and the plaintiff traced title to the land by sundry mesne conveyances from the patentee. It also introduced the certificate of the register of the land-office at Fairplay, showing that the application of Starr at that office to enter and pay for his claim, was made on the 18th of March, 1878; also a copy of the articles of incorporation of the plaintiff, and of the laws of Missouri under which the incorporation was had; and proved that the company purchased of the claimant the tract embraced in the patent in 1877, prior to the existence of the town of Leadville, for the purpose of using it for the construction of reduction works thereon, and that at the time of the purchase and when it commenced the construction of the works the land was unoccupied by other parties.

The plaintiff having rested its case, the defendants offered in evidence a certified copy of the record of proceedings in the General Land Office at Washington, upon which Starr obtained his patent; to the introduction of which the plaintiff objected on the ground, that it could only show or tend to show the regularity or irregularity of the proceedings before the executive department in obtaining the patent, or the validity or invalidity of the possessory title or pre-emption right upon which the patent was founded, and that no evidence could be introduced to impeach the patent or attack it collaterally, or in any way affect it in this action. But the court overruled the objection and admitted the record. To this ruling an exception was taken.

The case being closed, the court instructed the jury substantially as follows: That a patent for a mining-claim, since the passage of the act of Congress of 1870, could not embrace more than one hundred and sixty acres; that individuals and associations were, by that act, put upon the same footing, and that either might take that amount, but that by the mining act of Congress of 1872 an individual claimant was limited to twenty acres, whilst an association of persons could still take one hundred and sixty, as before; that the proceedings in the land-office were allowed in evidence in order to show whether the patent was issued upon locations made prior to 1870, and that they showed that the claim of Starr was based upon twelve or fifteen locations, some of which were prior to 1870, and some since then; and added, that "if Mr. Starr was the owner of these claims, if he had obtained them by purchase and they were valid and regular locations, he would, under the act, be required, if he desired to obtain a patent for them, to make application for

each one of them, to post the notice, as required by the statute, and give the publication and file his plat and survey, and do all these things which are required in the several claims upon each one of them. If he had done so, and his right had been supported as to all of them, and the patent had been issued for all of these claims, and each of them described in the patent, there would have been no objection to the patent; but it was not competent for him to consolidate these claims and put them all in as one claim, and upon notice given as one claim, and publication as one claim, and proceeding throughout as one claim embracing 164 acres," and that the officers of the land department had no authority in law to proceed in that way, and, therefore, the patent upon which the plaintiff relied was void and its title failed.

To the several instructions given exceptions were in due form taken. Under them the jury found for the defendants, and judgment in their favor was accordingly entered. To review this judgment the plaintiff has brought the case to this court on writ of error.

Mr. Justice Field, after stating the case as above, delivered the opinion of the court, as follows:

As seen by the statement of the case, the plaintiff relies for a reversal of the judgment upon three grounds: 1st. Error in admitting the record of the proceedings of the land-office to impeach the validity of the patent to Starr issued upon them; 2d, Error in instructing the jury that a patent for a placer-claim, since the act of 1870, could not embrace in any case more than one hundred and sixty acres; and, 3d, Error in instructing the jury that the owner by purchase of several claims must take separate proceedings upon each one in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the land officers to allow such application and to issue a patent thereon.

We are of opinion that these several grounds are well taken, and that in each particular mentioned the court below erred.

The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determined by them, is conclusive when brought to notice in a collateral proceeding.

Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, coun-

tersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the lands it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department and the correctness of its ruling upon matters submitted to it, the patent instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficacy as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. (Moore *vs.* Wilkeson, 13 Cal., 488; Beard *vs.* Federy, 3 Wall., 492–3.)

Of course, when we speak of the conclusive presumption attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it, that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.

These views are not new in this court; they have been, either in express terms or in substance, affirmed in repeated instances. One of the earliest cases on the subject was that of Polk's Lessee *vs.* Wendell, reported in 9 Cranch, where the doctrine we have stated was declared, and the exceptions to it mentioned. There the plaintiff brought an action upon a patent of North Carolina, issued in 1800, for five thousand acres. The defendants relied upon a prior patent of the State for twenty-five thousand acres, issued in 1795 to one Sevier, through whom they claimed. Each patent embraced the lands in controversy, and they were situated in that portion of Tennessee ceded to the United States by North Carolina. On the trial it was contended that the elder patent was void on its face because it covered more than five thousand acres, the limit prescribed for a single entry by the laws of that State. Proof was also offered that the lands had not been entered in the office of the entry-taker of the proper county before their cession to the United States,

and it was contended that the patent was therefore invalid. We shall hereafter refer to what the court said as to the alleged excess of quantity in the patent. At present we shall only notice the general doctrine declared as to the unassailability of patents in a court of law, and its decision upon the admissibility of the proof offered. It seems that a statute of 1777 directed the appointment in each county of an officer called an entry-taker, who was required to receive entries of all vacant lands in his county, and, if the lands thus entered were not within three months claimed by some other party than the person entering them, to deliver to such person a copy of the entry, with its proper number, and an order to the county surveyor to survey the land. This order was called a warrant. Upon it and the survey which followed a patent was issued. If there were no entry there could be no warrant, and of course no valid patent. The ninth section declared that every right claimed by any person to lands which were not acquired in this mode, or by purchase or inheritance from parties who did so acquire them, or which were obtained in fraud or evasion of the provisions of the act, should be declared void. In 1779 North Carolina ceded to the United States the territory in which the lands lie for which the patent to Sevier was issued, reserving, however, to the State all existing rights, which were to be perfected according to its laws. The cession was accepted by Congress. The survey, upon which the patent to Sevier was issued, was made in 1795, and the plaintiff, to impeach the patent, offered, as already stated, to show that there had been no entry of the land in the office of the entry-taker of the county where it was situated, previous to the cession; that is, in substance, that the grantor had no authority to make the grant, the land having been previous conveyed to the United States. This offer was disallowed by the court below, and as judgment passed for the defendants, the case was brought to this court, where, as mentioned, the general doctrine as to the presumptions attending a patent, which we have stated, was declared, with the exceptions to it. Upon the general doctrine the court observed, speaking through Chief Justice Marshall, that the laws for the sale of the public lands provided many guards to secure the regularity of grants and to protect the incipient rights of individuals and of the State from imposition; that officers were appointed to superintend the business, and rules had been framed prescribing their duty; that these rules were in general directory, and when all the proceedings were completed by a patent issued by the authority of the State, a compliance with those rules was presupposed, and that "every pre-requisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself." "It would, therefore, be extremely unreasonable," said the court, "to avoid the grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of the title from its commencement to its consummation in a patent;" but that there were some things so essential to the validity of a contract that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which the elder title was acquired might be examined, and that a court of equity was a tribunal better adapted to this object than a court of law; and it added that

"there are cases in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." So the court held that proof that no entry had been made in the office of the entry-taker in the county where the lands patented were situated, prior to the cession to the United States, was admissible under the ninth section, for without such entry they would not be within the reservation mentioned in the act of cession. In other words, proof was admissible to show that the State had not retained control over the property, but had conveyed it to the United States.

In Patterson *vs.* Winn, reported in 11 Wheaton, this case is cited, and after stating what it decided, the court said: "We may therefore assume as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it could be impeached collaterally in a court of law in an action of ejectment, *but in general other objections and defects complained of must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent.*"

The doctrine declared in these cases as to the presumptions attending a patent, has been uniformly followed by this court. The exceptions mentioned have also been regarded as sound, although from the general language used some of them may require explanation to understand fully their import. If the patent, according to the doctrine, be absolutely void on its face, it may be collaterally impeached in a court of law. It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. Of course, should such inconsistency appear, the grant would fail. Something more, however, than an apparent contradiction in its terms is meant when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid, either when read in the light of existing law, or by reason of what the court must take judicial notice of, as, for instance, that the land is reserved by statute from sale, or otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not intrusted by law with the power to issue grants of portions of the public domain.

So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a court of law. This exception is subject to the qualification, that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision.

With these explanations of the exceptions, the doctrine of the cases cited may be taken as expressing the law accepted by this court since they were decided. (Hoofnagle *vs.* Anderson, 7 Wheaton, 212; Boardman *vs.* Reed, 6 Peters, 342; Bagnall *vs.* Broderick, 13 Peters, 448; Johnson *vs.* Towsley, 13 Wall., 72; Moore *vs.* Robbins, 96 U. S., 535.)

In Johnson *vs.* Towsley the court had occasion to consider under what circumstances the action of the land department in issuing patents was final, and after observing that it had found no support for the proposition offered in that case by counsel upon certain provisions of a statute, said, speaking by Mr. Justice Miller, that the argument for the finality of such action was "much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authorty to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others." "That the action of the land-office," the court added, "in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted on the principle above stated, and in all courts and in all forms of judicial proceedings where this title must control either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted under the circumstances under which it was obtained," and then observed that there exists in the courts of equity the power to correct mistakes and to relieve against frauds and impositions; and that in cases where it was clear that the officers of the land department had, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give proper relief. The doctrine thus stated was approved in the subsequent case of Moore *vs.* Robbins.

The general doctrine declared may be stated in a diffent form, thus: A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid it will be presumed that such circumstances existed. Thus, in Minter *vs.* Crommelin, reported in 18 Howard, where it appeared that an act of Congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the land department unless specifically directed by the Secretary of the Treasury, and declared, that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the Secretary had ordered it to be sold, and the court said: "The rule being that the patent is evidence that all previous steps had been regularly taken to justify making a patent, and one of the necessary steps here being an order from the Secretary to the register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of Bagnell *vs.* Broderick, (13 Peters, 45,) and is not open to controversy anywhere, and the State court was mistaken in holding otherwise."

On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved

from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.

According to the doctrine thus expressed and the cases cited in its support—and there are none in conflict with it—there can be no doubt that the court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. (Boggs *vs.* Merced Mining Co., 14 Cal., 363–4.) It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied it can, on its own account, authorize proceedings to vacate the patent or limit its operation.

This doctrine as to the conclusiveness of a patent, is not inconsistent with the right of the patentee, often recognized by this court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims. Thus, in a contest between two patentees for the same land, it may be shown that a junior patent was founded upon an earlier entry than an older patent, and therefore passes the title. Such evidences in no way trenches upon the ruling of the department upon matters pending before it. Nor is the doctrine of the conclusiveness of the patent inconsistent with the right of a party resisting it to show, if an entry is not stated in the instrument, that no entry of the land was made as an initiatory proceeding, where a statute, as was the case in North Carolina, mentioned in Polk's Lessee *vs.* Wendell, declares that proceedings for the title, when such entry has not been made, shall be adjudged invalid. A statute may in any case require proof of a fact which otherwise would be presumed. Except with reference to such anterior matters and others of like character, no one in a court of law can go behind the patent and call in question the validity of the proceedings upon which it is founded.

The case at bar, then, is reduced to the question whether the patent to Starr is void on its face; that is, whether, read in the light of the existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress had provided for their sale. The proper officers of the land department supervised the proceedings. It bears the signature of the

President, or rather of the officer authorized by law to place the President's signature to it—which is the same thing; it is properly countersigned, and the seal of the General Land Office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining-claim which can be patented, has been disregarded. The case of the defendants rests on the correctness of their assertion, that a patent cannot issue for a mining-claim which embraces over one hundred and sixty acres. Assuming that the words "*more or less*," accompanying the statement of the acres contained in the claim, are to be disregarded, and that the patent is construed as for one hundred and sixty-four acres and a fraction of an acre, there is nothing in the acts of Congress which prohibits the issue of a patent for that amount. They are silent as to the extent of a mining-claim. They speak of locations and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own. The difficulty with the court below, as seen in its charge, evidently arose from confounding "location" and "mining-claim," as though the two terms always represent the same thing, whereas they offen mean very different things. A mining-claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel, according to the local customs, or, since the statute of 1872, according to the provisions of that act. (Sec. 2,324 of Rev. Stats.) The location, which is the act of taking the parcel of mineral land, in time became among the miners synonymous with the mining-claim originally appropriated. So, now, if a miner has only the ground covered by one location, "his mining-claim" and "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires the adjoining location of his neighbor—that is, the ground which his neighbor has taken up—and adds it to his own, then his mining-claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining-claim, and be so designated. Such is the general understanding of miners and the meaning they attach to the term.

Previously to the act of July 9, 1870, Congress imposed no limitation to the area which might be included in the location of a placer-claim. This, as well as every other thing relating to the acquisition and continued possession of a mining-claim, was determined by rules and regulations established by miners themselves. Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold-seekers into that territory. They spread over the mineral regions and probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules, prescribing the

conditions upon which mining ground might be taken up; in other words, mining-claims be located and their continued possession secured. Those rules were so framed as to give to all immigrants absolute equality of right and privilege. The extent of ground which each might locate, that is, appropriate to himself, was limited so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there buried in the earth. But a few months' experience in the precarious and toilsome pursuit drove great numbers of the miners to seek other means of livelihood and fortune, and they, therefore, disposed of their claims. They never doubted that their rights could be transferred so that the purchaser would hold the claims by an equally good title. Their transferable character was always recognized by the local courts, and the title of the grantee enforced. Many individuals thus became the possessors of claims covering ground taken up by different locators, and the amount which each person or an association of persons might acquire and hold was only limited by his or their means of purchase.

The rules and regulations originally established in California have in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation, that they have not to any great extent been interfered with by legislation, either State or national. In the first mining statute, passed July 26, 1866, they received the recognition and sanction of Congress, as they had previously the legislative and judicial approval of the States and Territories in which mines of gold and silver were found. That act declared, and the declaration was repeated in a subsequent statute, that the mineral lands of the public domain were free and open to occupation and exploration by all citizens of the United States, and by those who had declared their intention to become such, subject to such regulations as might be prescribed by law, and subject also "to the local customs or rules of miners in the several mining-districts," so far as the same were not in conflict with the laws of the United States. It authorized the issue of patents for claims on veins or lodes of quartz or other "rock in place" bearing gold, silver, cinnabar, or copper. Placer-claims first became the subject of regulation by the mining act of July 9, 1870, which provided that patents for them might be issued under like circumstances and conditions as for vein or lode-claims, and that persons having contiguous claims of *any size* might make joint entry thereof. But it also provided that no location of a placer-claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The mining act of May 10, 1872, declared that a location of a placer-claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer-claims, and they are re-enacted in the Revised Statutes, sections 2330, 2331. A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. In the mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining-

claim. Section thirteen of the act of 1870 declares that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the statute of limitation of the State or Territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Section five of the act of 1872, rendering a mining-claim subject to relocation where certain conditions of improvement or expenditure have not been made, has a proviso that the original locators, "*their heirs, assigns, or legal representatives*, have not resumed work upon the claim after such failure and before such location." These provisions are of themselves conclusive that the locator's interest in a mining grant is salable and transferable, even were there any doubt on the subject in the absence of express statutory prohibition. Those of the act of 1870 are also conclusive of the right of the purchaser, of claims to a patent, for it is with reference to it that the derivative right by purchase or assignment is mentioned. (Rev. Stats., secs. 2332, 2324.)

In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase, and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them, subject to the condition of certain annual expenditures upon them in labor or improvements. If he wishes, however, to obtain a patent, he must, in addition to other things, pay the Government a fee of five dollars an acre, a sum that would not be increased if a separate patent were issued for each location.

The decision of this court upon one point in the case of Polk's Lessees *vs.* Wendell, already cited, is directly applicable here. The patent to the defendants in that case was for twenty-five thousand acres of land, and one of the objections taken was that it was void because the statute of North Carolina limited an entry of one person to five thousand acres. But the statute declared that where two or more persons had entered, or should afterwards enter, lands jointly, or where two or more persons agreed to have their entries surveyed jointly in one or more surveys, the surveyor should survey the same accordingly in one entire survey. It was contended that as the statute provided for entries made by two or more persons, it could not be extended to the case of distinct entries belonging to the same person. To this the court replied as follows: "For this distinction it is impossible to conceive a reason. No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries, *adjoining each other*, in one survey. It appears to the court that the case comes completely within the spirit and is not opposed by the letter of the law. The case provided for is 'where two or more persons agree to have their entries surveyed jointly, &c.' Now this does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor that the assignee may survey the entries jointly or severally, at his election. The court is of opinion that, under a sound construction of this law, entries, which might

be joined in one survey, if remaining the property of two or more persons, may be joined, though they become the property of a single person." The objection to the patent by reason of its embracing over five thousand acres was accordingly overruled.

By a provision of the mining act of 1870, still in force, two or more persons, or association of persons, having contiguous claims *of any size*, are allowed to make a joint entry thereof. (Rev. Stats., sec. 2330.) If one individual should acquire all such contiguous claims by purchase, no sound reason can be suggested why he should not be equally entitled to enter them all by one entry as when they were held by the original parties. To quote the language of the case cited, "no motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries adjoining each other, in one survey."

The last position of the court below, that the owner of contiguous locations who seeks a patent must present a separate application for each and obtain a separate survey, and prove that upon each the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country. Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land officers from an increase of their fees. The public would derive no advantage from it, and the owner would be subjected to onerous and often ruinous burdens. The services of an attorney are usually retained when a patent is sought, and the expenses attendant upon the proceeding are in many instances very great. To lessen these as much as possible the practice has been common for miners to consolidate, by conveyance to a single person or an association or company, many contiguous claims into one, for which only one application is made and of which only one survey is had. Long before patents were allowed—indeed, from the earliest period in which mining for gold and silver was pursued as a business—miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one, for convenience and economy in working them. It was, therefore, very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset, and has ever since been, approved by the department, and its propriety has never before been questioned. Patents, we are informed, for mining ground of the value of many millions of dollars, have been issued upon consolidated claims, nearly all of which would be invalidated if the positions assumed by the defendants could be sustained.

It was urged on the argument that a patent for each location was required to prevent a monoply of mining ground—to prevent, to use the language of counsel, the public domain from being "monopolized by speculators." The law limiting the extent of mining lands which an individual may locate has provided, so far as it was deemed wise, against an accumulation of them in one person's hands. It could not have prohibited the sale of the location of an individual without imposing a re-

striction injurious to his interests, and in many instances destructive of the whole value of his claim. Every one, at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines, and in many instances can be obtained only from great distances by means of canals, flumes, and aqueducts, requiring for their construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams built, shafts sunk at great depth, and flumes constructed to carry away the debris of the mine. Indeed, successful mining, whether on lode-claims or placer-claims, can seldom be prosecuted without an amount of capital beyond the means of the individual miner.

There is no force in the suggestion that a separate patent for each location is necessary to insure the required expenditure of labor upon it. The statute of 1872 provides that on each claim subsequently located, until a patent is issued for it, there shall be annually expended in labor or improvements one hundred dollars; and on claims previously located, an annual expenditure of ten dollars for each one hundred feet in length along the vein; but where such claims are held "in common," the expenditure may be upon any one claim. As these provisions relate to expenditures before a patent is issued, proof of them will be a matter for consideration when application for the patent is made. It is not perceived in what way this proof can be changed or the requirement affected, whether the application be for a patent for one claim or for several claims held in common. Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining-claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim when one shaft would suffice for all the locations; and yet that is seriously argued by counsel and must be maintained to uphold the judgment below.

The statutes provide numerous guards against the evasion of their provisions by parties seeking a mining patent, and afford an opportunity to persons in the neighborhood of the claim to come forward and present any objections they may have to the granting of the patent desired. By sections six and seven of the act of 1872, which constitutes sections 2325 and 2326 of the Revised Statutes, the procedure which a party seeking a patent, whether an individual or an association or a corporation, must follow, is prescribed:

1st. The party must file an application in the proper land-office under oath, showing a compliance with the law, together with a plat and the field-notes of the claim, or "claims in common," made by or under the

direction of the surveyor-general of the United States, showing the boundaries of the claim or claims, which must be distinctly marked by monuments on the ground.

2d. Previously, however, to the filing of the application, the claimant must post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land embraced in it, and file an affidavit of at least two persons that such notice has been duly posted with a copy of the notice in the land-office.

3d. When such application, plat, field-notes, notice, and affidavits have been filed, the register of the land-office is required to publish a notice of the application for the period of sixty days, in a newspaper, to be designated by him, nearest to the claim, and post such notice in his office for the same period.

4th. The claimant, at the time of filing his application, or at any time thereafter, within sixty days, is required to file with the register a certificate of the United States surveyor-general, that five hundred dollars' worth of labor has been expended, or improvements to that amount have been made upon the claim by himself or grantors; that the plat is correct, with such further description, by reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent.

5th. At the expiration of sixty days the claimant is required to file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during the period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land-office, within the sixty days of publication, it is then to be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists.

6th. The statute then proceeds to declare that if an adverse claim is filed during the period of publication, it must be upon the oath of the party making it, and must show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of the notice and the making and the filing of the affidavit, shall be thereupon stayed until the controversy shall have been settled by a decision of a court of competent jurisdiction, or the adverse claim waived. And it is made the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment; and a failure to do so is to be deemed a waiver of his adverse claim. After judgment has been rendered in such proceedings, the party entitled to the possession of the claim, or any portion of it, may file a certified copy of the judgment-roll with the register of the land-office, together with a certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases; and must pay to the receiver five dollars an acre for his claim, together with the proper fees; and then the whole proceedings and the judgment-roll are to be certified by the register to the Commissioner of the General Land Office, and a patent thereupon issued for the claim, or such portion thereof as the applicant, by the decision of the court, shall appear to be entitled to.

It will thus be seen that if an adverse claim is made to the mining ground for which a patent is sought, its validity must be determined by a local court, unless it be waived, before a patent can be issued. There would seem, therefore, to be more cogent reasons, in cases where a patent for such ground is relied upon to maintain the doctrine which we have declared, that it cannot be assailed in a collateral proceeding, than in the case of a patent for agricultural land.

But it is unnecessary to pursue the subject further. The judgment of the court below must be reversed and the cause remanded for a new trial; and it is so ordered.

## SUPREME COURT OF THE UNITED STATES.

### FLAGSTAFF SILVER MINING COMPANY OF UTAH (LIMITED) *vs.* CULLINS.

*Wages—Lien.*—An overseer or foreman of miners is entitled to a lien on the mine for wages due, as in this case, under the statutes of Utah Territory.

In error to the supreme court of the Territory of Utah.

Mr. Justice Woods delivered the opinion of the court.

George Cullins, the defendant in error, brought suit against the Flagstaff Silver Mining Company of Utah, the plaintiff in error, in the district court of the third judicial district of the Territory of Utah, to recover wages which he claimed to be due him from the defendant in error for services rendered it, and to subject its property to a lien therefor in his favor, which he claimed attached by virtue of the statute of the Territory. The statute declared as follows:

"Any person or persons who shall perform any work or labor upon any mine or furnish any materials therefor in pursuance of any contract made with the owner or owners of such mine or of any interest therein, shall be entitled to a miner's lien for the payment thereof upon all the interest, right, and property in such mine, by the person or persons contracting for such labor or materials at the time of making such contract. Said lien may be enforced in the same manner and with the same effect as a mechanic's lien, as provided by the laws of Utah." (Compiled Laws of Utah, sec. 1221.)

The answer of the mining company denied that anything save a small balance was due the plaintiff, and denied that the statute of the Territory gave him a lien on its property for the sum due him.

The case was submitted to the district court upon the issues of fact as well as of law.

The court found that the defendant below was a corporation organized under the laws of Great Britain, and at the time the services of the plaintiff below were rendered was the owner of and engaged in working a mine called the Flagstaff mine, situate in Salt Lake county, in the Territory of Utah, and that one J. N. H. Patrick was its general agent and the manager of its mining and smelting business in America.

The court further found, "that on or about the 14th day of December, 1873, the said company, by said J. N. H. Patrick, its agent, for that purpose duly authorized, employed the plaintiff for an indefinite time thereafter to direct the *work* in its said mine, and with authority to employ and discharge miners, and procure and purchase supplies for working said mine; and that it was the duty of the plaintiff, by virtue of said employment, to plan, oversee, and direct the work in said mine, direct

the shipping of ore, and generally to control and direct the actual working and development of the mine; that the plaintiff, while in the employment of said company, performed said duties, and in the performance thereof did some manual labor."

The court also found that, at the commencement of the suit, there was due the plaintiff from the mining company, for wages earned by him under said employment, the sum of $1,530, for which sum the court gave judgment, and declared it to be a lien upon the mining company's mine.

From this judgment an appeal was taken to the supreme court of the Territory, by which it was affirmed.

This writ of error is prosecuted to reverse the judgment of the supreme court.

The plaintiff in error alleges that the district court of the Territory erred in declaring the judgment in favor of the defendant in error to be a lien on its mine, and that the supreme court of the Territory erred in affirming that decision. The precise question presented by the writ of error is whether the services found by the district court to have been performed by the defendant in error, for the mining company, were such "work and labor" as under the statute of the Territory entitled him to a lien therefor upon the mine.

Statutes giving liens to laborers and mechanics for their work and labor are to be liberally construed. (Davis *vs.* Alvord, 94 U. S., 545.) The finding of the district court makes clear the character of the services rendered by defendant in error. He was not the general agent of the mining business of the plaintiff in error. That office was filled by Patrick. He was not a contractor. The services rendered by him were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed the manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. He appears from the findings to have performed duties similar to those required of the foreman of a gang of track-hands upon a railroad, or a force of mechanics engaged in building a house. Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house.

Their performance may well be called work and labor; they require the personal attention and supervision of the foreman; and occasionally in an emergency, or for an example, it becomes necessary for him to assist with his own hands. Such duties cannot be performed without much physical exertion, which, while not so severe as that demanded of the workmen under the control of the foreman, is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of such duties may well be called work and labor, and that the district court rightfully declared the person who performed them entitled to a lien, under the law of the Territory.

We have examined all the cases cited by the plaintiff in error. None of them seem to be inconsistent with the views we have expressed. They decide that an architect and superintendent of a building, that a person employed to cook for men engaged in constructing a reservoir, that a contractor for the building of a railroad or the erection of a house,

that an agent employed to disburse money and pay off the hands who are building a house, that the assistant chief engineer of a railroad company, are not, under laws similar to the statute of Utah, entitled to a lien for their services. (Fousher *vs.* Grigsby, 12 Kentucky, (Bush,) 75; McCormack *vs.* Los Angles Water Co., 40 Cal., 185; Aiken *vs.* Watson, 24 N. Y., 482; Blakey *vs.* Blakey, 27 Mo., 39; Caldwell *vs.* Bower, 17 Mo., 564; Brockway *vs.* Innes, 39 Mich., 47; Peck *vs.* Miller, *Id.*, 594.)

The case which comes nearer supporting the contention of plaintiff in error than any other cited by him is Smallhouse *vs.* The Kentucky, etc., Co., (2 Mont., 443.) But in that case the court says, that "from the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or laborer, or that he labored directly in the construction of the buildings, but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the place named." This case is fairly distinguishable from the one now under consideration; but even if it fully supported the contention of the plaintiff in error, is entitled to no more weight than the decision of the supreme court of Utah in the present case.

Views similar to those we have expressed were declared by Williams, Chief Justice, in Willamette Falls Co. *vs.* Remick, (1 Oregon 169,) and by the supreme court of Nevada in Capon *vs.* Strout, (11 Nev., 309.)

It is somewhat difficult to draw the line between that kind of work and labor which is entitled to a lien, and what is mere professional or supervisory employment, not fairly to be included in those terms. Some courts have held, under laws similar to those of the Territory of Utah, that an architect who furnishes plans and superintends the erection of a building acquires a lien thereon, as for work and labor. (Stryker *vs.* Cassiday, 76 N. Y., 50; Mutual Benefit Life Ins. Co. *vs.* Rowand, 26 N. J. Eq., 389; Jones *vs.* Shawhan, 4 W. & S., (Penn.,) 257; Bank of Pennsylvania *vs.* Gries, 35 Pa. Stat., 423; Knight *vs.* Morris, 13 Minn., 473.)

It is not necessary in this case to go so far as these decisions would warrant. But we are clearly of opinion that, upon the facts found by the district court, the defendant in error, under the statute of Utah, was entitled to a lien upon the mine to which his services were applied. The judgment of the supreme court of Utah must, therefore, be affirmed.

## SUPREME COURT OF THE UNITED STATES.

### KAHN *VS.* CENTRAL SMELTING COMPANY.

*Mining partnership.*—Mining partnerships, unlike ordinary partnerships, are not dissolved by the death or bankruptcy of one of its members, or the assignment of his interest.

*Co-tenant accounting.*—Where two of three co-tenants of a mining-claim assign their interest, there is a sufficient co-tenancy between the remaining co-tenant and such assignees to enable him to maintain a suit against them for an accounting.

Appeal from the supreme court of the Territory of Utah.

Mr. Justice Field delivered the opinion of the court.

This is a suit to compel the defendants to account for the proceeds of a mining-claim in Utah, known as the Montreal claim, and to pay over to the plaintiff the amount to which he may be entitled upon such accounting. The complaint alleges that on the 14th of December, 1874, the plaintiff and two other persons, by the name of Deronso and Be-

rassa, were the owners and tenants in common of the claim, each having an undivided third; that they then entered into an arrangement to work the claim for the ores and metals it contained, and from that time until February, 1876, they were a mining partnership engaged in working the mine, bearing the expenses and sharing the profits equally, Deronso and Berassa having the immediate direction, control, and management of its working; that on the first of February, 1876, his associates sold and transferred their interest in the mine, and in the tools, implements, and appurtenances connected therewith, to the defendant, Isador Morris, through whom the other defendants immediately acquired all the rights they possess; that from that time until the 10th of April, 1876, the defendants were in full charge and possession of the property, and extracted from the mine and sold about sixteen hundred tons of ores, worth about forty-five thousand dollars, the expense of extracting and marketing of which did not exceed ten thousand dollars; that since the first of February the plaintiff has been a partner with the defendants in the mining-claim and is entitled to his share of the profits made—being one-third of the whole—and has demanded of the defendants a statement of their work and an accounting; but they have refused to comply with his demand, or to give him any information on the subject, or any share of the profits, and have denied him access to the books of account of the concern; and that the profits amount, according to his information and belief, to about $35,000. He therefore prays for a decree establishing the partnership between him and the defendants, and directing an accounting from them and the payment of the amount found due to him upon such accounting; and for such other and further relief as to the court may seem meet and equitable.

The answer of the defendants traverses the allegations of the complaint, and avers that on the 31st of January, 1876, the defendant, Isador Morris, found Deronso and Berassa in the actual possession of a portion of the Montreal mine, of which they claimed to own two-thirds; that, believing they owned such interest, Morris paid to them $25,000 for it and received a quit-claim deed from them; that on the following day, for the like sum, he conveyed, by a similar deed, that interest to one Wadsworth, in trust for such persons as a majority of the members of the Sandy Smelting Company of Salt Lake City might direct, and that afterwards such majority conveyed the same to the defendant, the Central Smelting Company, remaining, however, in the possession of and working the mine until about March 1, 1876, when the smelting company took possession of it, and afterwards held it exclusively until the 1st of April following. The answer further avers that a short time prior to this last date the mine was claimed by another company, called the Old Telegraph Company, under an older location; that, thereupon, the Central Smelting Company and its vendors caused the prior location and the mining-claim to be carefully examined by experienced miners, and upon that examination they became satisfied that the older location and the Montreal mine were one and the same vein or lode, and that the Montreal mine was owned by the holders of the earlier location; that having become thus satisfied of this fact, the Central Smelting Company abandoned the Montreal mine, and has not since held, used, or occupied the same, or exercised any acts of ownership over it.

The answer further avers that the defendants never worked the Montreal mine or extracted ore from it, under any agreement with the plaintiff, or by his advice or consent, or in conjunction with him, or as his mining partners; that they have always refused to recognize him as a party in any work, labor, or management, or business of the mine; that the proceeds of the mine received by the Central Smelting Company and its immediate vendors, after deducting the expenditures, show a net profit of about $12,000, which the defendants hold until the determination of suits now pending between the plaintiff and the owners of the alleged earlier location; that those suits are brought to determine whether the Montreal mine and the earlier location are one and the same lode, and which of the parties is entitled to its possession and the proceeds; and the defendants pray for their protection that the prosecution of this suit may be restrained until those suits are determined.

On the trial, evidence was produced by both parties, and from it the court found as facts—

*First.* That there was no partnership between the plaintiff and the defendants, as charged in the complaint.

*Second.* That there was no such co-tenancy between them in the mine in controversy as entitled the plaintiff to an accounting; and as a conclusion of law, that he had no right to recover in the action, and that the suit should be dismissed. These findings were filed November 21, 1877, and judgment upon them was entered the same day. From this judgment the plaintiff appeals to this court. Fourteen days after its entry the judge who heard the case, at the request of the plaintiff, filed further findings of fact. It does not appear that any notice was given to the defendants of any intended application to the court to make any findings in addition to those originally filed; and to make such findings without such notice was irregular. The practice if permitted would lead to great abuses. It is not absolutely necessary in any case that the findings should accompany the announcement of the decision of the court; but, when they are required—and by the practice established in Utah they are required in all cases where issues of fact are tried without a jury—they should be filed before the entry of the judgment or decree, as in such cases upon them the judgment or decree rests. If either party is dissatisfied with them, and desires more full or additional ones, he should, within a reasonable time during the same term, and before an appeal is taken or a writ of error sued out, apply to the court, upon proper notice to the adverse party, to make such fuller or additional findings; and if the application is granted, the additional findings should show on their face why they are made. The additional findings in this case not having been thus made, were properly stricken from the transcript. Taking, then, the original findings, let us examine whether they meet the issues raised by the pleadings and support the decree: for under the practice of Utah, where in a case seeking equitable relief, the facts are found by the court (and not by a master or jury where the findings are merely advisory) they will be taken as its conclusions upon the evidence, and their sufficiency for the decree rendered will be considered.

The plaintiff avers that his association with his co-tenants of the mine was a mining partnership, and seeks to enforce his rights as a member

of such partnership, and to obtain such other and further relief as he may be equitably entitled to. The opinion of the judge before whom the case was heard shows that he did not recognize the existence of any partnership in mines differing from ordinary partnerships; and his finding that there was no partnership, as alleged, between the plaintiff and defendants, necessarily followed. The allegations of the complaint, whilst asserting a mining partnership, show that no other partnership existed after the sale of Deronso's and Berassa's interest. Such sale would have ended any ordinary partnership.

Mining partnerships as distinct associations with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them, successful mining would be attended with difficulties and embarrassments much greater than at present. In Skillman *vs.* Lockman, the question of the relation existing between parties owning several interests in a mine came before the supreme court of California, and that court said that "whatever may be the rights and liabilities of tenants in common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them; and, to a certain extent, they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership." (23 Cal., 203.) The same doctrine is asserted in numerous other cases, not only in that court, but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each other of members of a mining association. The *delectus personæ*, which is essential to constitute an ordinary partnership, has no place in these mining associations. (Duryea *vs.* Burt, 28 Cal., 569; Settembre *vs.* Putnam, 30 *Id.*, 490; Taylor *vs.* Castle, 42 *Id.*, 369.) There are no other consequences resulting from this peculiarity of a mining partnership, particularly as to the power of individual members to bind the association, upon which there is no occasion now to express any opinion. (Skillman *vs.* Lockman, *supra;* Dickinson *vs.* Valpy, 10 B. & C., 128; Ricketts *vs.* Burnett. 4 Q. B., 686.)

But if the relation of the plaintiff to his associates could not be considered as one of a mining partnership, he was still entitled to an accounting from them, if, as alleged by him, he was joint owner with them in the mine. They went into possession of the property under a conveyance from his co-tenants, and admit that whatever proceeds they have received from it were taken under a claim of ownership derived from that source. They have, upon their own averments, only a claim, in any event, to two-thirds of the proceeds; and if the plaintiff was a tenant in

common with them, they can only refuse his demand to the other third by repudiating their own right to any portion. If a co-tenant, he had a right to call for an accounting, whatever might be the ultimate result of the claim of third parties to the whole proceeds as the owners of the mine under a prior location. He was, therefore, entitled to a finding on the question of his co-tenancy. The judge of the district court seemed to recognize this position, for, after finding that there was no partnership —following in this respect his peculiar notions as to the non-existence of such an association as a mining partnership—he passed upon the claim as an accounting as a tenant in common of the mine with the defendants, and found "that there was no such co-tenancy between the plaintiff and defendants in the mine in controversy as entitled the plaintiff to an account." This is not a sufficient finding of fact upon which to base a decree; it does not state that there was no co-tenancy between the parties; it implies that there was a co-tenancy; it only states that there was not such an one as entitled the plaintiff to an accounting. This is a mere legal inference, not the finding of a fact. If a co-tenancy of any kind existed, it is a question of law whether or not it entitles one co-tenant to an accounting from the others.

In considering the whole case, we think that justice will be subserved by a new hearing. The defendants recognize the possibility of the plaintiff ultimately establishing his right to a portion of the proceeds of the mine in their hands against the claimants of the alleged earlier location. They aver that they hold the proceeds subject to the determination of pending suits between those parties. The present decree, if affirmed, would cut off any claim of the plaintiff, even should he prevail in that litigation.

The decree will be, therefore, reversed and the cause remanded, with direction to the supreme court of the Territory to send it to the district court for a new hearing; the parties to be at liberty to produce new proofs; and it is so ordered.

## UNITED STATES CIRCUIT COURT, DISTRICT OF NEVADA.

### 420 MINING COMPANY *vs.* BULLION MINING COMPANY.

*Patent for mining-claim—Who entitled to—Under the act of Congress of* 1866 (14 *Stats.*, 251.)—The right to purchase a mining-claim on a gold or silver-bearing lode, and to receive a patent therefor from the United States, was granted to the person, or association of persons, who in pursuance of the law of the State or Territory, and the mining customs, rules, and regulations of the place embracing the location, recognized and enforced by the courts, is the owner, and entitled to the possession, as against everybody except the United States.

*Pre-emption.*—The right given is simply a right of purchase, and is in the nature of a pre-emption right, founded upon like principles as the pre-emption laws; and not a right similar or analogous to that of a grantee under an inchoate or imperfect Mexican grant.

*Defences in abatement and on merits.*—Under the statute of Nevada, authorizing the defendant to set up in his answer as many defences as he has, if an answer contains a defence which only goes to defeat the present action and other defences on the merits, and the issues as to both are in fact found for defendant, but the judgment is apparently entered for defendant upon the finding upon the merits, the matter upon the merits will be *res adjudicata*, and the parties will be estopped from further litigating the merits, even though the issue of the matter of abatement is also found in favor of defendant, and the judgment might have been rested on that issue.

*Same.*—In such case, where all the issues are in fact especially found in favor of the

defendant, and judgment entered thereon generally, without any provision that it shall be without prejudice, or without any other limitation or restriction, the estoppel will extend to every matter of fact in issue and in fact found by the court in favor of the defendant.

*Several defences in same answer.*—Where the statute authorizes the defendant to set up in the same answer as many defences as he has, and several defences are set up, and it is competent for the court to determine them all without reference to the character of the different defences. and where all are in fact determined, the determingtion as to all will be conclusive between the parties.

*Estoppels mutual.*—When the finding and judgment in the given case are conclusive on both parties if conclusive on one, the estoppel is mutual within the meaning of the rule requiring estoppels to be mutual.

*Judgment technically correct reversed.*—Where a judgment is broader in its scope and more advantageous to a party than he is entitled to have, it will be reversed and modified, although upon the record it appears to be technically correct.

*Same.*—A judgment which would operate as an estoppel upon points that manifestly ought not to be concluded, will be reversed, although there is no technical error shown by the record.

*Partial new trial.*—A new trial may be granted under the practice of Nevada, upon some issues, without disturbing the findings upon other issues, and in such cases the judgment would not necessarily be reversed if the remaining findings not vacated are sufficient to sustain the judgment; the judgment in such case may be reversed, modified, or affirmed, as justice may require, but there would be no estoppel as to the matter embraced in the finding vacated.

*Statutes of limitations and mining-claims,*—The statute of limitations of Nevada relating to ming-claim, constitutes a part of the local laws by which the rights of parties are to be determined for the purpose of ascertaining who is entitled to purchase a part of the mineral lode under the act of July 26, 1866.

*Parol partition.*—A parol partition executed by the parties taking actual exclusive possession of the portions respectively assigned to them in pursuance of the agreement to partition, which possession and partition are acquiesced in by the parties, is valid, and upon such a partition the parties ceased to be tenants in common.

*Tenants in common ouster.*—One tenant in common may oust his co-tenant, and claim adversely, thereby setting the statute of limitations in motion, and from the time of such actual ouster and adverse possession they deal at arm's length, and there is no longer any relation of trust or confidence between them.

*Title under statutes of limitations.*—Adverse possession for the time limited by statutes of limitations not only bars of remedy, but extinguishes the right, and vests a perfect title in the adverse holder.

*Same title quited*—A title acquired under a statute of limitation will be quieted in the adverse holder on a bill in equity filed for that purpose, even against the holder of the paper title barred.

Before Sawyer, circuit judge. Demurrer to bill in equity.

The facts as alleged in the bill are as follows:

On June 23, 1859, John Cosser and Walter Cosser, under the firm name of Cosser & Co., J. Morris, J. Durgan, Thomas Winters, V. A. Houseworth, C. True, J. Powell, and A. Ricard located and appropriated, in the manner prescribed by the mining rules, on the Comstock lode, a mining-claim of 1,600 feet in length on the lode; took possession of the same, and thereby as tenants in common, became the owners of said claim, as against all the world except the United States. In July, 1859, the said parties, while still in possession, by a verbal agreement, to which all assented, agreed that said mining-claim should be segregated into two parts, and that said Durgan, Morris, Powell, Ricard, and True should thenceforth, as tenants in common, own and possess exclusively the portion of said claim and lode extending from its northern boundary southerly a distance of 420 feet, and should re-

lease all their interest in the other portion of said claim and lode to said Winters, Cosser & Co., and Houseworth, who should own and possess in the same manner said southern portion of said claim and lode, and release to said first-named parties all their interest in said northern portion of 420 feet. In pursuance of said agreement a monument was placed to make the division line, and the parties took possession of their respective portions—Durgan and his associates taking possession of the northern part, and Winters and his associates of the southern part, and thenceforth each of said parties and their successors in interest exclusively held possession and improved the part so allotted to them in accordance with the mining rules and regulations, and claimed no interest in the other portions of said claim or lode.

No written conveyance was ever made in pursuance of said agreement, and no demand for one was ever made, except the demand for the purposes of this action. All the right, title, and interest of said Durgan and his associates in said north 420 feet of said lode were subsequently, by sundry mesne conveyances conveyed to the complainant, a corporation organized under the laws of Nevada. Between the segregation, as aforesaid, and January 1, 1864, said Durgan and associates had spent, in prospecting and developing said mine, not less than $30,000, and since the latter date the 420 Mining Company have for like purposes spent an additional sum of $30,000. The Bullion Mining Company, a corporation organized under the laws of California, has since acquired all the right, title, and interest of said Winters and his associates in the southern portion of said lode, and has since held the same in accordance with the mining rules and regulations. On November 16, 1868, the Bullion Mining Company commenced an action in the proper court against the 420 Mining Company, to recover said northern 420 feet of said lode, alleging title in plaintiff and wrongful possession and withholding by defendant. Defendant answered, admitting possession by defendant, but denying that the possession was wrongful. This action was voluntarily dismissed on plaintiff's motion without trial, on June 3, 1872, without notice to the defendant to the action. On November 6, 1868, while the 420 Mining Company is alleged to have been in possession of said northern 420 feet of said lode, the Bullion Mining Company applied at the proper land-office for a patent, embracing the whole of said claim, both the southern part and said northern 420 feet conveyed to the 420 Mining Company, being the part now in controversy under the act of Congress, entitled, "An act to grant the right of way to ditch and canal owners, and for other purposes," approved July 26, 1866, and in pursuance of such application for a patent, embracing the whole of said claim on the Comstock lode, was issued in due form to said Bullion Mining Company on March 26, 1875.

It is alleged in the bill that the said application for a patent was based solely on the said location made June 23, 1859, and that the only pretence of title to said part in controversy is a conveyance to the Bullion Mining Company of their interest therein by said Durgan and his associates, made subsequently to the said conveyance by the same parties to the 420 Mining Company, with a knowledge at the time on the part of the Bullion Mining Company of the prior conveyance to the 420 Mining Company. On November 30, 1872, the 420 Mining Company commenced an

action in the proper court in the State of Nevada against the Bullion Mining Company, to determine the adverse right of the latter company to said 420 feet of said lode, which action was duly tried and a judgment thereing duly entered, and a copy of the record in that suit is annexed to and made a part of the bill of complaint in the present action.

It is further alleged that by reason of the issue of the patent, as aforesaid, the legal title to said northern 420 feet of said lode became wrongfully vested in the defendant; but that by reason of the facts alleged the complainant was really the owner of said 420 feet of mining ground, and entitled under said act of Congress to the patent therefor. The bill thereupon prays that the complainant be decreed to be entitled to said mining ground; that the defendant holds the legal title in trust for complainant, and that it may be required to convey said 420 feet of said lode to complainant.

The complaint in the record of the said action of the 420 Mining Company, against the Bullion Mining Company, to determine the adverse claim of the latter, attached to, and made a part of the bill, alleges that that the 420 Mining Company, complainant therein, is "the owner of, in possession of, and entitled to the possession of, the said 420 feet of the Comstock lode now in controversy;" that the Bullion Mining Company, defendant therein, "claims an estate or interest therein adverse to the plaintiff," and denies the validity of such adverse claim. It then sets out the commencement of the said former action by defendant against complainant to recover possession of said 420 feet; the answer of defendant denying the right; the application of defendant in this action for a patent; the filing of protest by complainant; the subsequent dismissal of the action to recover possession by complainant in that action, (defendant in this,) without notice to the defendant therein that the right has never been determined between the parties; and praying that the Bullion Mining Company, defendant, be required to set forth its claim; that the right of the parties be determined by the court; and that the defendant, the Bullion Mining Company, be adjudged not to have any estate or interest in the said mining ground, etc. The answer to said complaint denies the ownership of the complainant, its right of possession, and its actual possession, of said 420 feet, or any part thereof, at the time of the commencement of the action. It denies that the defendant's claim is without right and then affirmatively avers that "at the date of the commencement of this action, and for a long time prior thereto, it was and still is the owner of, and in possession of, and entitled to the possession of, said mining ground, ledge, or lode, and every part thereof." It then alleges affirmatively, in appropriate terms, an adverse possession in the defendant of the said 420 feet of the Comstock lode for a period exceeding the time required to give a title under the statute of limitations of Nevada in cases of mining-claims; and that during all of said time the defendant had held and worked such claim in the manner required by the laws and customs in force in the district in respect to such claim; and then also avers affirmatively that neither the claimant nor any person under whom it holds had been seized or possessed of said 420 feet or any part therein within the period prescribed by the statute of limitations applicable to such cases; and further, that the alleged cause of action had not accrued within the period of four

years. Upon the trial of the issues the court found the facts to be as follows:

"1. That the plaintiff was incorporated in the State of California, on the twenty-third day of June, A. D. 1863.

"2. That the trust-deeds were executed to the 420 Mining Company, located in the Virginia mining-district, county of Storey, Territory of Nevada, the first bearing the date September 30, 1863, and the second, July 5, 1864, and each conveys all the right, title, and interest of the parties therein named, as grantors of, in and to, that certain mining ground known as the mining ground of the 420 Mining Company. No other description of the ground is given, and no title in either of the grantors to the mining ground in dispute in this action was shown.

"3. That some time in the fall of 1859 a shaft was commenced on the northern end of the ground in dispute in this action, by some persons claiming to represent a company called the 420 company, and thereafter, down to the early part of the year 1863, work was done in three different shafts on the ground in dispute, by persons claiming to work for a company called the 420 company; that no further work for any company of that name is shown to have been done until some time in the year 1865, when some persons commenced work in a shaft on said ground, claiming to work for the 420 company, and continued there for a short time, until ejected by the employers of the defendant as hereafter stated.

"4. That on the sixteenth day of November, 1865, the defendant in this action filed a complaint in this court against the plaintiff, alleging that it was the owner of the ground in dispute in this action, and that the defendant had entered upon and taken possession of, and ousted the plaintiff from said mining ground now in dispute, and was still in possession thereof, holding adversely to the plaintiff, the Bullion Mining Company. Said complaint was sworn to by George W. Hopkins, secretary of said Buillion Mining Conmpany. To that complaint the defendant, the 420 Mining Company, this plaintiff, filed an answer denying specifically each allegation of the complaint, and the same was sworn to by C. J. Lansing, its attorney in the case; said action was pending untried until the — day of ——, 1872, when it was dismissed, on motion of the plaintiff therein.

"5. There was no evidence showing that any location of the mining ground in dispute in this action had ever been made by the plaintiff, or any person or persons through whom it claims.

"6. The defendant proved that it claimed under two locations of the ground, and claim in dispute in this action. The two claims were united early in 1863, under the name of the Bullion Mining Company, and on the eighteenth day of February, A. D. 1863, a trust-deed, in which some of the original locators in each of said locations joined, was executed by various persons which conveyed in terms to this defendant mining ground which embraces all the ground in dispute in this action.

"7. In August, 1860, persons commenced work on the mining ground described in finding six, under the locations therein mentioned, and continued work until the conveyance made to the defendant as aforesaid, and defendant has continued to work thereon day and night, from that time to within a few months past, all the time claiming title to all of said mining grounds, including said ground in dispute.

"8. On the seventh day of June, 1866, defendant received from one G. W. Birdsall a deed of a mining-claim, embracing the mining ground in dispute in this action. No title thereto was shown in said Birdsall; but defendant claimed title under that deed and the trust-deed aforesaid.

"9. That the agents of defendant, in the year 1865, forcibly ejected from the mining ground in dispute in this action the persons mentioned in finding three as working thereon for the 420 company, and from that time until the commencement of this action, and until the trial, the defendant has been in the actual, exclusive, and uninterrupted occupation and possession of all the mining ground in dispute in the action aforesaid, claiming title thereto, and claiming the same adversely to plaintiff.

"As a conclusion of law, I find that the defendant is entitled to judgment as prayed in the answer, and order accordingly."

Thereupon the following judgment or decree was entered:

"This cause came regularly for trial on the fifteenth day of August, A. D. 1873, and by oral consent given in open court, a jury was waived, and the trial had by the court; and the court having heard the evidence, and the cause being subsequently submitted, the judge this day filed his findings of fact herein in favor of the defendant. Thereupon it was ordered by the court that judgment be accordingly entered for the defendant. Wherefore it is ordered and adjudged that the plaintiff is not entitled to any of the relief prayed for in its complaint, and that it take nothing by its action. It is further adjudged that the defendant have and recover of the plaintiffs its costs of suit, taxed at $155.05.

"Judgment filed August 21, 1873."

The following are the provisions of the act of Congress construed by the court:

Section 1 of the act of July 26, 1866, "granting the right of way to ditch and canal owners over the public lands, and for other purposes," declares "mineral lands on the public domain to be free, and open to exploration and occupation by all citizens of the United States," subject to such regulation as may be prescribed by law, and subject also to the local customs and rules of miners in the several mining-districts, so far as the same may not be in conflict with the laws of the United States. Section 2 provides that "whenever any person, or association of persons, claims a vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs and rules of miners in the district where the same are situated, and having expended in actual labor and improvements thereon an amount of not less than $1,000, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for such claimant, or association of claimants, to file in the local land-office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and usages of miners, and to enter such tract and receive a patent therefor, granting such mine," etc.

Section 3 provides "that upon the filing of the diagram as provided in the second section of this act, and posting the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land-office shall publish a notice of the same in a

newspaper published nearest the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of such period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed, and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land-office shall transmit to the General Land Office said plat, survey, and description, and a patent shall issue for the same therefor."

Section 6 provides as follows:

"That whenever any adverse claimant to any mine located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication in the court of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases."

Section 9 makes similar provisions for confirming water rights under like circumstances; that is to say, "whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, and other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected therein." On July 9, 1870, six sections were added to the act, and were thenceforth to form a part of it. Similar rights under section 12 (section 1 of the new act) were extended to the possessors of placer-claims; and section 13 provided that "where said person or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim."

In 1872, a new act was passed as a substitute for much of the former acts, making still more specific provisions as to mode of proceedings, etc., but providing that the repeal of portions of former acts should not affect rights already vested thereunder, and that proceedings to perfect such vested rights might be had in pursuance of the provisions of the new act.

Sawyer, circuit judge, after stating the facts: Upon the facts shown by the bill of complaint, the defendant insists that the right of the four hundred and twenty feet of the Comstock lode in question, and consequently the right to the patent, appears in the bill to have been once directly put in issue in an action between the same parties, fully litigated and determined in favor of the defendant, and that the matter is *res adjudicata*, and a bar to further litigation. On this ground it is claimed that the bill shows no equity. After a careful consideration of the acts of Congress, set out in the statement of the case, it is clear to my mind

that it was the intention of Congress to give the right of purchase of a mining-claim, to a silver or gold-bearing lode or vein, to the person, or association of persons, who, in pursuance of the laws of the State or Territory, and the local mining customs, rules, and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner, and entitled to the possession as against everybody, except the government of the United States. It will be seen that the act expressly refers to and recognizes the laws of the State or Territory, the local customs, rules, and regulations, not in conflict with the laws of the United States, the decisions of the courts, and even in express terms the State and Territorial statutes of limitations applicable to the subject. The act requires the party seeking a patent to file a diagram of the claim, and post a copy in a conspicuous place on the claim, together with a notice of intention to apply for a patent, and requires the register of the land-office also to publish a notice of the same in a newspaper, published at the nearest place, for ninety days. It then authorizes the adverse claimant, before approval of the survey, to file a protest, upon which all proceedings are stayed "until final settlement and adjudication in the courts of competent jurisdiction of the rights of possession to such claim, when a patent may issue as in other cases. That adjudication is to be had in the ordinary courts, and to be determined under the ordinary rules, regulations, customs, and laws of the locality. It seems impossible to come to any other conclusion, than that the party who at the time can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs, rules, and regulations, is the party upon whom Congress intended to confer the right to purchase, no matter how that right originated, if under such laws and customs and decisions of the courts he has the present right. And this is simply a right to purchase a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy; and what this privilege is, is stated in the case of Hutton *vs.* Frisbie, (37 Cal., 479,) and Frisbie *vs.* Whitney, (9 Wall., 191.)

The case is in nowise like the case of an inchoate, imperfect Spanish grant; but is in all respects like a case under the pre-emption laws. The object of a determination of the right by litigation where there is an adverse claim is simply to ascertain the party who has the right to the claim under the laws of the State, and local rules and customs; for that person, when found, is the party upon whom the law confers the privilege—the right of purchase. There is no bounty about it, for the party must pay for the land five dollars per acre and the cost of survey, which is more than double the price of ordinary public lands. Undoubtedly the price is often far less than the real value, and so it is in ordinary pre-emption cases; but this fact in no way affects the principle upon which the law proceeds. Doubtless the object of conferring the privilege is to encourage exploration of hidden mines, as the privilege in ordinary cases of pre-emption is to encourage settlement and cultivation of the public lands, for the purposes of developing the resources, and contributing to the general prosperity of the country.

If I am right in this view—and it really does not seem open to serious argument—then, in order to ascertain which party was entitled to a

patent, it is only necessary to determine which party at the time of the issue was the rightful owner of the mining-claim in question as against everybody but the United States, under the laws, rules, customs, and the decisions of the courts in force at the time in the locality embracing it, without regard to the act of Congress; for the act of Congress remits the parties to these laws, rules, and customs solely to determine their rights.

* * * * * * * *

It is further argued on the part of the complainant that the statute of limitations does not apply, because the title is in the United States, and such statutes do not run against the government, and Gibson *vs.* Choteau (13 Wall., 92) is cited to sustain the position. But this case can have no application, for as we have seen, the party who is the owner of the mining-claim as against everybody but the United States, under the laws of the State or Territory, and the rules and regulations of the locality embracing the mine, irrespective of the act of Congress, is the party entitled to a patent, and the statutes of limitations of the State or Territory applicable to the subject themselves constitute a part of the laws by which the right to a mining-claim is to be determined, for the purpose of ascertaining who is the party upon whom the right to purchase is conferred by the act of Congress; such statutes, as we have seen, are expressly recognized by section 13, of the act of Congress as a part of the laws by which the right to a patent is to be determined.

So, again, it is urged that there was a trust, or confidence, reposed in the defendant and its grantors by complainant and its grantors, as tenants in common, which precluded the defendant from acquiring the title except for the benefit of all. This proposition is also untenable. According to the allegations of the bill, there was a valid parol partition and segregation of the interests of the parties, executed and followed by exclusive possession in pursuance of such partition. Such partitions are doubtless valid. (Long *vs.* Dollarhide, 24 Cal., 218.) Thus the parties by this partition ceased to be tenants in common, and forever after dealt at arm's length. Besides, the taking possession of the whole under conveyance from the former locators, claiming to own the whole, and excluding the complainant and its grantors, was a hostile act, which constitutes an ouster, and set the statute of limitations in motion. It certainly will not be claimed that one tenant in common cannot oust his cotenant, and by long continued adverse possession bar his right. But, as we have seen, the parties had ceased to be tenants in common.

After a careful consideration of the case, I am satisfied that the right of the defendant as against the complainant was exclusively adjudicated in the former action, and that the patent properly and rightfully issued to the defendant in its own right.

This decision is given in full in 3 Sawyer, 634.

### UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

LEADVILLE MINING COMPANY *vs.* FITZGERALD; STEVENS & LEITER *vs.* MURPHY.

*Lode.*—Definition of a lode or vein.

Extracts from Judge Hallett's decision:

"Until the discovery of mineral deposits near Leadville, no controversy had arisen in this State as to whether a lode or vein is in place within the

meaning of the act of Congress. The mines opened in Cedar Creek, Gilpin, Boulder, and other counties descend into the earth so directly that no question could arise as to whether they were inclosed in the general mass of the country. Whatever the character of the vein and whatever its width, it was sure to be within the general mass of the mountain. But the Leadville deposits were found to be of a different character. In some of them, at least, the ore was found on the surface, or covered only by the superficial mass of slide, debris, detritus, or movable stuff, which is distinguishable from the general mass of the mountain, while others were found beneath an overlying mass of fixed and immovable rock, which could be called a wall as well as that which was found below them. It then became necessary to consider very carefully the meaning of the words, 'in place,' in the act of Congress, in order to determine whether these deposits were of the character described in that act. Section 2320 of the Revised Statutes refers to veins and lodes in 'rock in place,' and of course no other can be brought within the terms of the act. After careful consideration, it was thought that *a vein or lode could not be in place within the meaning of the act, unless it should be within the general mass of the mountain; it must be inclosed by or held within the general mass of fixed and immovable rock.* It is not enough to find the vein or lode lying on the top of fixed or immovable rock, for that which is on top is not within, and that which is without the rock in place cannot be said to be within it. * * *

"As to what was said by counsel with reference to the position of the vein or lode, I am still of the opinion that, *if it descends from the plane of the horizon, it is to be regarded as a departure from the perpendicular. It is conceded that if the vein be exactly upon the plane of the horizon, it is not within the act.* In every position, however, from the horizontal to the perpendicular, it must be said that it has departed from the perpendicular. And here, if the evidence is to be believed, the lode is somewhat below the plane of the horizon, and so within the meaning of the act, as one which may be pursued beyond the side lines of the claim in which its outcrop may be found.

### UNITED STATES CIRCUIT COURT, DISTRICT OF COLORADO.

#### TABOR *vs.* DEXTER.

*Lode.*—Definition of a lode or vein.

Opinion by Hallett, J.:

This is a bill for an injunction by parties owning the New Discovery lode, in California mining-district, against the owners of an adjoining claim called the Little Chief. It is not alleged that the defendants have entered upon or into the New Discovery ground, or that they have in any way interfered with plaintiff's possession within the limits of the New Discovery location. The charge is that plaintiff's lode descends into the Little Chief's ground on its dip, and that defendants are there mining and exhausting the ore. In other words, plaintiffs contend that the top of the lode is in their ground, and that they have the right to follow upon its downward course into and through adjoining territory. To maintain this position it is necessary to show that the lode is *in place*, within the meaning of section 2320 Revised Statutes of the United States. And this depends upon the position of the ore or vein

matter in the earth, as whether the inclosing mass is fixed and immovable, more than upon the character of the ore itself. Whether the ore is loose and friable, or very hard, if the enclosing walls are country rock, it may be located as a vein or lode. *But if the ore is on top of the ground, or has no other covering than the superficial deposit, which is called alluvium, diluvium, drift, or debris, it is not a lode or vein within the meaning of the act, which may be followed beyond the lines of the location.* In this bill it is alleged that the overlying material is boulders and gravel, which cannot be *in place* as required by the act. Not much is known to the court of the deposits on Fryer Hill, but it would seem, from the allegations in this bill, that they differ materially from the Iron mine, which has a hanging wall as well as a foot-wall. For the decision of this motion it is enough to say that, where the mass overlying the ore is mere drift or a loose deposit, the ore is not in place within the meaning of the act. Upon principles recently explained, a location on such a deposit of ore may be sufficient to hold all that lies within the lines, but it cannot give a right to ore in other territory, although the ore body may extend beyond the lines. The motion will be denied.

## SUPREME COURT OF OREGON.

### GOLD HILL QUARTZ MINING COMPANY *vs.* ISH.

*Eminent domain.*—Mines of precious metals belonging to the eminent domain of the political sovereignty.

*Occupancy—Right of, recognized by the act of Congress of July* 26, 1866.—The General Government extended to all in possession of mining-claims, and all subsequently locating and denouncing mines containing the precious metals, a guarantee of protection in their occupancy so long as the mines are operated.

*Pre-emption.*—The provisions relative to pre-emption of mining lands in said act, and the amendments thereto, are not obligatory.

*Patent to mineral lands.*—A patent for agricultural lands does not pass title to known deposits of precious metals.

*Effect of failure to segregate mineral lands.*—Failure of government surveyors to segregate mineral from agricultural lands cannot operate to defeat the rights of occupant miners.

This suit was instituted to quiet the title to and enjoin the respondent from asserting any rights in and to a certain gold-bearing quartz lode, situate in Jackson county.

The complaint alleges that Henry Klippel, John McLaughlin, Charles S. Drew, N. C. Dean, Thomas Chavner, and John E. Ross, on December 5, 1865, located six claims upon the said lode, in accordance with the provisions of the State laws and the local laws and customs of miners. On December 11, 1865, the said parties filed articles of incorporation under the general laws of the State. The name of the incorporation was declared to be "The Gold Hill Quartz Mining Company;" the capital stock was fixed at $60,000, and the object was the working of the said lode. The company was duly organized, the stock books opened, and the stock subscribed. Contemporaneous with the filing of the said articles of incorporation, the parties aforesaid duly transferred their claims to the said company. Ever since said transfer, and up to July 8, 1871, the said company were in possession of said claims, working said lode by driving tunnels, etc., for the purpose of procuring the quartz rock and extracting the gold therefrom, and had, up to said date, expended thereon $1,090. The possession of the said company was open and no-

torious, and the respondent had actual notice thereof, and of the character and extent of the appellant's claims.

On June 15, 1870, respondent applied to the officers of the proper United States land-office to purchase the west half of the northeast quarter and east half of the northwest quarter of section fourteen, township thirty-six south, of range three west, of the Willamette meridian, upon which the lode in controversy is situated; and having been allowed to purchase said lands as agricultural lands, a patent therefor was issued to respondent on August 11, 1870. The said patent was recorded July 8, 1871, and until said date the appellant had no notice of the application for and purchase of said lands by the respondent, nor that respondent had any claim to or interest in the same.

The respondent demurred to the complaint. After argument the court below sustained the demurrer and dismissed the complaint with costs.

From the order dismissing the same this appeal is taken.

By the court, McArthur, J.: The claims upon the gold-bearing quartz lode in controversy were located and taken up in the year 1865, in accordance with the provisions of the act of the legislative assembly of the State of Oregon, approved October 24, 1864, and the acts amendatory thereof. They were "opened up" and operated under the State laws for a number of months prior to the passage of the act of Congress of July 26, 1866, commonly called the "mining act." This act was the first direct and positive recognition on the part of the General Government of the right of the citizen to explore the public domain for the precious metals, and to denounce and operate mines when found. Anterior to the passage thereof the General Government, in carrying out a policy redounding to the public good, tacitly consented to the search for and development of the mines, and the courts, applying what has been often denominated "the common law of the mines," uniformly protected the rights of those engaged in mining for the precious metals.

They recognized the binding force of the local laws, customs, and usages of the miners in all cases, when those local laws, customs, and usages did not conflict with written constitutions or legislative enactments. Taking into consideration the condition of the country and the importance of encouraging mining operations, and the non-action of the General Government, they held that those engaged in mining for the precious metals enjoyed a species of franchise in the mines, and that they held the same free from all molestation or interference of all parties save the General Government.

That the General Government has the exclusive right to control the mines has never been seriously questioned; the principle being conceded that mines of precious metals belong to the eminent domain of the political sovereignty, as well under the laws of Spain as by the common law of England and public law of the United States.

All the reported cases in California and Nevada lead to the conclusion that the non-action of the General Government raised such a presumption of license to those engaged in mining for the precious metals as to give them a standing in the courts to assert their rights and redress their wrongs against all persons except the General Government.

The right of mining for the precious metals is a franchise, and the at-

tending circumstances raise the presumption of a general grant from the sovereign of the privilege. (Conger *vs.* Weaver, 6 Cal., 548; Merced Mining Company *vs.* Fremont, 7 *Id.*, 327; Hill *vs.* King, 8 *Id.*, 338; McKeon *vs.* Brisbee, 9 *Id.*, 142; Partridge *vs.* McKinney, 10 *Id.*, 183; State *vs.* Moore. 12 *Id.*, 70; Curtis *vs.* Sutter, 15 *Id.*, 263; Hughes *vs.* Devlin, 23 *Id.*, 506; Horn *vs.* Jones, 28 *Id.*, 202; Pralus *vs.* Jefferson G. & S. Mining Company, 34 *Id.*, 559; Correa *vs.* Frietas, 42 *Id.*, 340.)

Accepting this as a postulate, it follows that the General Government itself could not equitably interfere with or abridge the rights of the miner. We are of the opinion that "there are equitable circumstances connected with these mining-claims that are clearly binding upon the conscience of the governmental proprietor, that must never be disregarded. Rights have become vested in virtue of the license that cannot be divested without a violation of all the principles of justice and reason."

In Sparrow *vs.* Strong, (3 Wallace, 104,) Chief Justice Chase used the following forcible language: "We know that the Territorial legislature (of Nevada) has recognized by statute the validity and the binding force of the rules, regulations, and customs of the mining-districts. And we cannot shut our eyes to the public history which informs us that under this legislation, and not only without interference by the national government but under its implied sanction, vast mining interests have sprung up, employing many millions of capital and contributing largely to the prosperity and improvement of the whole country."

The decision quoted from, which was rendered in December, 1865, is a clear recognition by our highest judicial tribunal of the underlying principle upon which rest the rules governing this species of property, which have had practical operation for nearly a quarter of a century.

It follows, then, that the locators and operators of the claims upon the quartz lode in controversy were invested with a franchise which the courts would protect and uphold. Thus they stood before the passage of the act of Congress of July 26, 1866.

By this act the mineral lands of the public domain, both surveyed and unsurveyed, are declared to be free and open to exploration and occupation to all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law.

Any person or association claiming a vein or lode of quartz rock in place, bearing gold, silver, cinnabar, or copper, who have expended in improvements thereon not less than one thousand dollars, and have occupied and improved the same according to the local customs or rules of miners in the district, and in regard to which there is no controversy or opposing claim, may acquire title to the same by filing a diagram, in the local land-office, of said claim, giving notice and performing such other acts as are prescribed by law. As has before been stated, this act was the first direct and positive recognition on the part of the General Government of the right of the citizen, and the alien who had declared his intention to become such, to explore the public domain for the precious metals, and to denounce and operate mines when found. Whatever difference of opinion may exist as to the tenure by which mining-claims

were held prior to the passage of this act of Congress, it is clear that, by the act, the General Government extended to all in possession of mining-claims, and to all subsequently locating and denouncing mines containing the precious metals, a guarantee of protection in their occupancy so long as the mines are operated and worked. The lode in controversy was, when "claimed," situate upon surveyed lands belonging to the General Government. Pursuant to instructions the lands were sold as agricultural lands, and patented to Ish on August 11, 1870.

The application to purchase was made subsequent to the passage of the act of 1866, and at a time when the possession of the appellant was open and notorious. Thus the adverse interest of Ish, if any interest he has, did not accrue until after the passage of the said act, and was, therefore, in violation of the guarantee of occupancy created by the first section thereof. But Ish obtained no interest in the mining-claims on the lode by the patent. True, by the patent he obtained a given quantity of agricultural lands, and the lode is situated upon said lands; but the known deposits of precious metals did not pass by the patent, for they are expressly reserved from sale under the pre-emption and other land acts. The only law under which patent to mining-claims, either lode or placer, can be obtained, is the act of 1866, and the amendments thereto.

The fact that the claims of the appellant were not segregated and listed as mineral lands cannot avail the respondent. Segregation, when required, must be made by the surveyor; and to hold that the failure of the surveyor to fully discharge his duty could operate to defeat the rights of the appellant, would be violative of the plainest principles of justice. Moreover, the returns of the surveyor are not conclusive as to the character of the lands, for the Commissioner of the General Land Office, in carying out the policy of the General Government in the disposal of the public lands, allows affidavits as to the character of the lands to be made in impeachment of the returns of the surveyors. The open and notorious possession of the appellant was sufficient to charge the respondent with notice of the character of the lode, and also to bring the lode within the description of "known mineral deposits." Nor are the rights of the appellant forfeited, nor in the least abridged, by failure to procure a patent for the claims upon the quartz lode. "It is understood," says the Commissioner of the General Land Office, in the instructions to the local land-officers, "that there is nothing obligatory on claimants to proceed under the statute (act of 1866;) and where they fail to do so, there being no adverse interest, they hold the same relation to the premises they may be working, which they did before the passage of the act, with the additional guarantee that they possess the right of occupancy under the statute." (Copp's Mining Decisions, p. 245.)

Before leaving this case it becomes necessary to allude to the prayer of the complainant, and to express our views in relation to the proper relief to be afforded. The prayer asks for a decree of the circuit court, declaring the defendant a trustee for the plaintiff; that the defendant be required to execute a good and sufficient deed to the plaintiff of the land included within the boundaries of the claims, and also for a perpetual injunction inhibiting the defendant from setting up any title to said claims.

Inasmuch as Ish never obtained title to the lode, he cannot be de-

creed to be trustee for the plaintiff, nor can he execute a deed conveying to the plaintiff the legal title.

The proper relief to be granted is an injunction order perpetually enjoining and inhibiting Ish, and all persons claiming, or to claim by or through or under him, from asserting any title to the lode, and also from in any manner interfering with the plaintiff in entering upon and working the claims thereon.

Decree reversed.

## SUPREME COURT OF THE UNITED STATES.

### IVANHOE MINING COMPANY *vs.* KEYSTONE CONSOLIDATED MINING COMPANY.

*School sections.*—The grant of the sixteenth and thirty-sixth sections of public lands to the State of California by the act of March 3, 1853, was not intended to cover mineral lands, but such lands were excluded from that grant, as they were from all others, by the settled policy of the General Government on that subject.

*Settlement which will defeat school grant.*—The settlement required by the seventh section of the act of 1853, which defeats the grant of those sections for school purposes, need not be precisely the same, either in regard to the acts to be done or the character of the settler, as is required under the general pre-emption law of 1841. The settlement on the school lands under the act of 1853 is governed by that act.

*Indemnity right, when vested.*—Whenever there exists, at the time the government survey is made of such a section, a settlement, by dwelling-house or cultivation, on any portion of said section, on which some one is residing and asserting claim to it, the title of the State to that portion does not vest, but the alternative right to other land as indemnity does. Sherman *vs.* Buick, (93 U. S. R., 209,) and Natoma Water Co. *vs.* Bugby, (96 U. S. R., 165,) commented on and explained.

In error to the circuit court of the United States for the district of California.

Mr. Justice Miller delivered the opinion of the court.

The action in this case was brought originally in the State court of California by Daniel W. Gillette against the present defendant in error, to recover possession of the east half of section 36, in township 7 north, range 10 east, of Mount Diablo meridian, and in the progress of the case it was transferred to the circuit court of the United States, where judgment was rendered in favor of the defendant. The plaintiff in error having been substituted for Gillette, as his successor in interest, the case was submitted to the court by the parties waiving a jury.

The plaintiff asserted title to the land in controversy under a patent from the State of California, and the defendant under patents from the United States. The title of California rests upon the act of Congress granting that State the 16th and 36th sections of every township for school purposes, and that of defendant on the acts of Congress concerning the possession and sale of the mineral lands.

As the question to be decided necessarily involves the title to much other mineral land in California, in which the authorities of the State of California, and the officers of the land department of the United States, entertain and act upon conflicting views of the rights of the State and the General Government, the State of California, by her counsel, and the United States, by the Attorney-General, have been permitted to take part in the argument.

The defendant only claims part of the land embraced in plaintiff's patent, and denies the possession of that for which no title is asserted; and as no possession is proved beyond that for which the defendant defends, only that is in controversy.

The court below finds that this is mineral land, and that the patent of the United States was issued to defendant for three several mining-claims, to wit: the Spring Hill, the Geneva, and the Keystone; that the Spring Hill was located in May, 1851, the Keystone in 1853, and the Geneva in October, 1863; and that the original locators of said claims and their grantees have held undisturbed possession thereof ever since, and by such possession, and the working of said mines, the possessory title was vested in defendant at the time it filed its application for said patent in the land-office of the United States at Sacramento, January 6, 1871, unless the State of California had acquired title to section 36 by grant from the United States. It also appears that on the land thus claimed by plaintiff, a mining town called Amador City exists, of about 400 or 500 people, which began in 1850, and reached the number mentioned in 1853, with many dwelling-houses, and some forty acres cultivated by the owners of the Keystone mining-claim.

On the 18th June, 1870, one Henry Casey applied to the State authorities to purchase the half section of land on which this town and these mining-claims were located, and a State patent was issued to his vendee, Gillette, October 3, 1872.

The township in which this land lies was surveyed in the field in March, 1870, the survey approved September 3, 1870, and the plat filed in United States land-office at Sacramento, October 7, 1870; and within three months after this latter date the application of the defendant was made for patents for the three mining-claims, and the patents issued July 14, 1873.

The right to these patents, and the claim of the town of Amador City, were contested before the register and receiver, the Commissioner of the General Land Office, and the Secretary of the Interior, by the State of California and the parties claiming under her, and the decision was adverse to the title of the State. (See page 101.)

The question, and the only question, presented for our consideration is very sharply presented by this statement of facts and by the acts of Congress pertinent to the subject; and it is whether under these acts the title of the land in question became fixed and vested absolutely in the State of California, on the ascertainment by the survey of 1870 that it was part of the thirty-sixth section of the township in which it lies.

The act of March 3, 1853, under which the right of the State of California to the school lands arises, has been the subject of construction in this court more than once heretofore, and the decision of the question before us requires a further critical examination of its provisions. The first five sections of it provide for the establishment of the offices of surveyor-general, two land offices, with registers and receivers, and for the organization of the general land system of the United States, including surveys; and it then proceeds to lay down the rules by which rights to the public lands may be acquired. The granting clause of the sixteenth and thirty-sixth sections of the public lands as thus surveyed, to the State of California, is as follows:

"SEC. 6. *And be it further enacted*, That all the public lands in the State of California, whether surveyed or unsurveyed, with the exceptions of sections sixteen and thirty-six, which shall be, and hereby are, granted to the State for the purposes of public schools in each township,

and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting, also, the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed."

Section seven of the act may as well be read here, as it is important to a true solution of the question under consideration:

"SEC. 7. *And be it further enacted*, That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other lands shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled 'An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for,' and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands."

The twelfth section grants to the State seventy-two sections for the use of a seminary of learning, to be selected by the Governor or some one appointed by him, in legal subdivisions of not less than a quarter-section, of any unsold, unoccupied, and unappropriated public lands, "*Provided*, That no mineral lands, or lands reserved for any public purpose whatever, or land to which any settler may be entitled under the provisions of this act, shall be subject to such selection."

The thirteenth section also grants the State ten sections of land for the purpose of erecting the public buildings of the State, with the same proviso as the one to section twelve.

The proviso to the third section is also relied upon as indicative of the purpose of Congress in regard to the mineral lands of California. That section contains the authority under which the surveyor-general is to act in surveying the public lands in that State, and after investing him with the powers conferred on other surveyors-general, and some specific directions for the survey of private land claims, it is "*Provided*, That none other than township lines shall be surveyed where the lands are mineral, or are deemed unfit for cultivation; and no allowance shall be made for such lines as are not actually run and marked on the field, and were actually necessary to be run."

It is strongly urged by plaintiff's counsel that the language of the granting clause imports a grant *in presenti*, and that wherever by any survey of the government thereafter made the location of the sixteenth and thirty-sixth sections of a township was ascertained, it establishes

the title in the State from the date of the statute, namely, March 3, 1853.

It is quite unnecessary to enter upon this question, which has been before us in so many shapes, for if it be conceded that such would be the effect of the statute if there were no words of exception in the grant, Congress has, in nearly every case where the question has arisen, made such specific exceptions to the operation of the grant as to decide the matter without resort to the rule of construction asserted by plaintiffs.

Take, for instance, railroad grants. Besides the more general reservations from the grant, there is almost always found a provision that where, by the location of the road, the sections on each side of it are ascertained which would pass by the general terms of the grant, those which have been pre-empted, sold, or otherwise disposed of, shall not so pass, but the grantee may select other lands in lieu of those, which may be said in this manner to be excepted out of the grant.

This is true of the statute under consideration, and we may pass this branch of the argument by conceding that if the land in controversy is subject to the grant, the title relates to the date of the act of Congress.

Defendants allege that it was not so subject to the grant, for two reasons:

1. That it is mineral land, and that the grant of school lands to the State does not cover any mineral land.

2. That by virtue of the seventh section, such settlement and cultivation had been made on the land, before the survey was made, as to take it out of the grant, and remit the State to the selection of other public land in lieu of this.

We will consider these in their order.

Very soon after the conquest of California, and its cession to the United States by Mexico, it was found to be rich in the precious metals; and such was the rapid influx of immigrants from the Eastern States that the California population, at the time it was organized as a State, in 1850, was largely composed of mining-camps and settlements engaged in mining these metals. As nearly all those mines were discovered on land the title of which was vested by the treaty in the government of the United States, it became important to determine what course the government would take with regard to this new source of untold wealth. The Spanish government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the crown, which made Spain for a time the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that with the territory we had acquired the laws which governed the production of gold from the earth. Others believed that whether this were so or not, it would be a wise policy for the government to secure to itself a fair proportion of the metal produced from its own ground. But, while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and before a State could be organized, had become its dominating element, with wealth and numbers and claims which demanded consideration.

Matters remained in this condition, with slight exception, until the year 1866, when Congress passed a law by which title to mineral land might be acquired from the government at nominal prices, and by which the idea of a royalty on the product of the mines was forever relinquished. (14 U. S. Statutes, 251.)

During this period, however, from 1849–1866, the system of the disposition of the public lands in general had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and in all this the attention of Congress was necessarily turned to the distinction between mineral lands and the ordinary agricultural lands of the other Western States to which similar laws had applied. This distinction is nowhere more plainly manifested than in this act of 1853. As we have said in Sherman *vs.* Buick, (93 U. S. R., 209,) the main purpose of that act was to provide for the survey and sale of the public lands and for the right of pre-emption to the settler on these lands, and there was embraced in this clause of pre-emption the grant of the sixteenth and thirty-sixth sections to the State for school purposes. In the very sentence which contains this grant in parenthesis, and while introducing the new principle, that the public lands should be subject to the right of pre-emption, whether surveyed or unsurveyed, the mineral lands are excepted, in express terms, from this right and from public sale.

We say that this introduced a new principle in pre-emption law, for except in a very few cases, no right of pre-emption had before existed until the lands were surveyed, so that the pre-emptor could designate by the description of the Congressional survey the precise land to which his pre-emption attached.

But this right of pre-emption, on unsurveyed lands, was by this statute to last but one year, and so careful was Congress to protect mineral land from sale and from pre-emption that, as we have already shown by the proviso to section three of the act, the surveyors were forbidden to extend their surveys over mineral lands.

The effect of this was as Congress intended it should be, that as no surveys could be made of mineral lands until further order of Congress, there could be no sale, pre-emption, or other title acquired in mineral lands until Congress had provided by law for their disposition. The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

It is a strong corroboration of this view that Congress in the section (12) of this same statute, giving the State seventy-two sections for a seminary of learning, declares that no mineral lands shall be taken under the grant, and makes the same reservation of its mineral lands in the grant for the erection of public buildings in the State.

We find a similar provision in the grant to the Pacific Railroad Companies, whose road it was known would pass through some of these mineral regions. By the fourth section of the act of 1864, (13 U. S. Statutes, 358,) it is declared that neither that act nor the act of 1862

shall be held to include in the grant "any government reservation or mineral lands, or the improvements of any *bona-fide* settler on any lands, *returned or denominated* mineral lands."

As we have already said, Congress, after keeping this matter in abeyance about sixteen years, enacted in 1866 a complete system for the sale and other regulation of its mineral land so totally different from that which governs other public lands as to show that it could never have been intended to submit them to the ordinary laws for disposing of the territory of the United States.

Taking into consideration what is well known to have been the hesitation and difficulty in the minds of Congressmen in dealing with these mineral lands, the manner in which the question was suddenly forced upon them, the uniform reservation of them from survey, from sale, from pre-emption, and above all from grants, whether for railroads, public buildings, or other purposes, and looking to the fact that from all the grants made in this act they are reserved, one of which is for school purposes besides the 16th and 36th sections, we are forced to the conclusion that Congress did not intend to depart from its uniform policy in this respect in the grant of those sections to the State.

It follows from the finding of the court and the undisputed facts of the case, that the land in controversy, being mineral land, and well known to be so when the surveys of it were made, did not pass to the State under the school-section grant.

It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the act of 1853.

In the case of Sherman *vs*. Buick, (93 U. S. R., 209,) we have said in reference to this section that it was unnecessary to decide whether the improvements found on the land when the survey was made and the character of the person owning them should be in all respects those which are prescribed by the general pre-emption law. We are now satisfied that this section prescribes its own rules on that subject, and that whenever, at the time these sections are ascertained by the government survey, there is either a dwelling-house or the cultivation of any portion of the land, on which some one is residing and is asserting claim to it, the title of the State does not vest, but the alternative right to other land as indemnity does. It is only necessary to look to what we have said in Sherman *vs*. Buick, of the fact that Congress had in view the rapid settlement of the country, and the long time which might elapse before it could be known by actual survey where these school sections would be found, to see that a liberal construction must be given to the language by which Congress expresses its purpose to protect these settlements, buildings, and cultivations, and that we have no right to add other qualifying incidents to the exercise of this right than those found in the statute. These are not the same required under the general pre-emption law, and we have no authority to import the latter into the new statute.

Some of the expressions found in Sherman *vs*. Buick, and in the Natoma Water Co. *vs* Bugby, (96 U. S. R., 165,) are supposed by counsel to convey a different meaning; but in the use of the words pre-emption and pre-emptor, in reference to *this section of the statute*, it was not designed to imply all that was meant by those terms in the act of 1841 and its amendatory adjuncts, but to convey the idea of a settlement and

a settler according to the terms of the statute under consideration. Nor is there anything in the principle announced in the latter case, that where a settler abandons his claim to hold the land against the State by virtue of such settlement or improvement, and acknowledges the title of the State by purchase, that his improvement or settlement cannot be set up by a third person to defeat the title of the State recognized by the United States, which conflicts with what we have just said, or with the defendants' rights in the present case. Here the settlement, building, and cultivation have been continuous for twenty years, with constant assertion of claim. The same parties or their privies are still claiming it. None of them have accepted title under the State, or acknowledged its right to the land. The government of the United States has given them a patent founded on this very possession, use, and occupation. Nothing in that opinion justifies the construction placed upon it by counsel, and the case is clearly inapplicable to the one before us.

We are of opinion that the settlement, building, and cultivation, found as facts by the circuit court, bring the case within the provisions of the seventh section of the act of 1853, and necessarily render void the title asserted under the State by plaintiff.

It follows that the judgment of the circuit court is right, and it is accordingly affirmed.

## SUPREME COURT OF THE UNITED STATES.

### HEYDENFELDT *vs.* DANEY GOLD AND SILVER MINING COMPANY.

*School sections in Nevada.*—At the time of the passage of the Nevada enabling act, approved March 21, 1864, (13 Stat., 30,) sections 16 and 36, in the several townships, had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the public domain within the limits of Nevada.

*State of Nevada to receive compensation for lost school sections.*—The words of present grant in the seventh section of that act are restrained by words of qualification, which were intended to protect the proposed new State against loss that might happen through the subsequent action of Congress in selling or disposing of the public domain. If by such sale or disposal the whole, or any part of the sixteenth or thirty-sixth section in any township, was lost to the State, she was to be compensated by other lands equivalent thereto, in legal subdivisions of not less than one-quarter section each.

*When mineral claimant's right is superior to State claimant's.*—A qualified person whose settlement on mineral lands, which embrace a part of either of said sections, was prior to the survey of them by the United States, who, on complying with the requirements of the act of Congress approved July 26, 1866, (14 Stat., 251,) received a patent for such lands from the United States, has a better title thereto than has the holder of an older patent therefor from the State.

*United States title to mineral lands recognised.*—The legislative act of Nevada of February 13, 1867, recognized the validity of the claim of the United States to the mineral lands within that State. (3 Otto, 634.)

In error to the supreme court of the State of Nevada.

Mr. Justice Davis delivered the opinion of the court:

This is an action of ejectment to recover a specific portion of the west half of the southwest quarter of section sixteen, township sixteen, range twenty-one east, in Lyon county, Nevada. The land in controversy is rich in minerals, and was not surveyed by the United States until the year 1867. Prior to the date of the survey, or the approval of it, the defendant's grantors and predecessors in interest had, for mining purposes, entered upon the land, and claimed and occupied it according to

the mining laws and the customs of miners in the locality. This possession and claim of ownership have been continuous and uninterrupted, and the defendant has expended over eighty thousand dollars in the construction of improvements for carrying on the business of mining on the land.

The plaintiff claims title from the State by patent. It is dated the 14th day of July, 1868, and was issued on the assumption that sections sixteen and thirty-six, whether surveyed or unsurveyed, and whether containing minerals or not, were granted to the State for the support of common schools by the seventh section of the Nevada enabling act, approved March 21, 1864, (13 Stat. 32.)

This interpretation of that act is denied by the General Government, and the defendant has a patent of the 2d of March, 1874, from the United States, for the land in controversy, issued in conformity with the laws of Congress on the subject of mining. Which is the better title, is the point for decision. It has been the settled policy of the government to promote the development of the mining resources of the country, and as mining is the chief industry in Nevada, the question presented for decision is of great interest to the people of that State.

The seventh section of that act is as follows: "That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be, shall be, and are hereby granted to said State for the support of common schools."

It is true that there are words of present grant in this law, but in construing it we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. "It is better always," says Sharswood, judge, "to adhere to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction." (Gyges' Estate, 65 Pa. State, 312.)

If a literal interpretation of any part of it would operate unjustly or lead to absurd results, and be contrary to the evident meaning of the act taken as a whole, it will be rejected. And there is no better way of discovering the true meaning of a law, when there are expressions in it which are rendered ambiguous by their connection with other clauses, than by considering the necessity for it and the causes which induced the legislature to pass it. With these rules as our guide it is not difficult, we think, to give a true construction to the law in controversy.

Congress, at the time, was desirous that the people of the Territory of Nevada should form a State government and come into the Union. The terms on which this admission could be obtained were proposed, and, as was customary in the enabling acts for new States, the particular sections of the public lands to be donated to the State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the public lands within the Territory of Nevada.

But this condition of things did not stand in the way of Congress making proper provision on the subject. Some provision was necessary in order to place Nevada in this respect on equal footing with States re-

cently admitted. But the people were not interested in getting the identical sixteenth and thirty-sixth sections in every township. Indeed, it could not be known until after survey where these sections would fall, and a grant of quantity put Nevada in as good a condition as other States which had received the benefit of this bounty. A grant operating at once and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the public domain until there was a segregation by survey of the land granted. In the meantime further improvements would be arrested, and the persons who, before the surveys were made had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the granted lands. Congress was fully advised of the condition of a new community like Nevada; of the evil effects of such legislation upon its prosperity, and of all antecedent legislation upon the subject of the public lands within the bounds of the proposed new State. In the light of this information, and surrounded by these circumstances, Congress made the grant in question. That it is ambiguous is very clear, for the different parts of it cannot be reconciled, if the words used are to receive their usual meaning. Schulenberg *vs.* Harriman (21 Wallace, 44) establishes the rule that "unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense." This is a correct rule, and we do not seek to depart from it, but there are words of qualification in this grant.

And these words restrict the operation of the words of present grant. If their literal meaning be taken, they refer to past transactions; but evidently they were not used in this sense, for there had been no lands in Nevada sold or disposed of by any act of Congress, and why indemnify the State against a loss that could not occur? There could be no loss, and there was no occasion of making provision for substituted lands, if the grant took effect absolutely on the admission of the State into the Union, and the title to the lands then vested in the State. Congress cannot be supposed to have intended a vain thing, and yet it is quite certain that the language of the qualification was intended to protect the State against a loss that might happen through the action of Congress in selling or disposing of the public domain. It could not, as we have seen, apply to past sales or dispositions, and to have any effect at all must be held to apply to the future.

This interpretation, although seemingly contrary to the letter of the statute, is within its reason and spirit. It accords with a wise public policy, gives to Nevada all she has any right to ask for, and acquits Congress of passing a law which in its effects would be unjust to the people of the Territory. Besides, no other construction is consistent with the statute as a whole, and this alone answers the evident intention which the makers of it had in view, and this was to grant to the State *in præsenti* a quantity of land equal in amount to the 16th and 36th sections, the grant to take effect when the status of the lands was fixed by survey and they were capable of identification. Congress, however, reserved until this was done the power of disposition, and if in the exercise of this power the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal

in quantity and as near as may be in quality. By this means the State was indemnified against loss, and the people ran no risk of losing the labor of years. While the State suffered no injury, Congress was left free to dispose of the public domain in any way it saw fit, to promote the interests of the people.

It is argued that, conceding the construction given this grant to be correct, this defence cannot be sustained, because the land in controversy was not actually sold by direction of Congress until after this survey. This position ignores a familiar rule in the construction of statutes, that they must be so construed as to admit all parts of them to stand if possible. (Bouvier's Institutes, p. 42, sec. 7.)

The language used is, "sold or otherwise disposed of by any act of Congress," and the point made by the plaintiff would reject a part of these words from the statute.

To limit the qualification to the grant in this way would defeat one of the main purposes Congress had in view. Congress knew, as did the whole country, that Nevada was possessed of great mineral wealth, and that mineral lands should be disposed of differently from those which were fit only for agriculture. No method for doing this had then been provided, but Congress said to the people of the Territory, "You shall, if you decide to come into the Union, have for the use of schools a quantity of land equal to two sections in every township, and the identical sections themselves, if on survey no one else has any claim to them; but until this decision is made and the lands surveyed, we reserve the right either to sell them or dispose of them in any other way that commends itself to our judgment." This right of disposition is subject to no limitations, and the wisdom of not surrendering it is apparent. The whole country is interested in the development of its mineral wealth, and to accomplish this object adequate protection was required for those engaged in this business. This protection was furnished by the act of Congress of July 26, 1866, (14 U. S. Stats., p. 251,) which was passed before the land in controversy was surveyed. This act disposes of the mineral lands of the United States to actual occupants and claimants, and provides a method for the acquisition of title from the United States. And these defendants occupied the land prior to the survey and were entitled to purchase, and the patent subsequently obtained from the government relates back to the time of the original location and entry, and perfects their title.

These views dispose of this case, but there is another ground equally conclusive. Congress, on the 4th of July, 1866, (14 Stat., p. 85,) passed an act concerning lands granted to the State of Nevada, and among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was, doubtless, intended by Congress as a construction of the grant in this case; but whether that construction be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to any construction put upon it by the grantor. The State, through its legislature, (see act of February 13, 1867,) ratified the construction given to it by Congress, and accepted it with the conditions annexed.

We agree with the supreme court of Nevada, that this acceptance "was a recognition by the legislature of the State of the validity of the claim made by the government of the United States to the mineral lands."

It is objected that the constitution of Nevada inhibited such legislation, but the supreme court of the State, in the case we are reviewing, held that it did not, (10 Nevada Reports, p. 314,) and we think their reasoning on this subject is conclusive.

We see no error in the record, and the judgment is affirmed.

## SUPREME COURT OF THE UNITED STATES.

### FORBES *vs.* GRACEY.

*Extracted ore is personal property, and taxable.*—Although the title to mineral lands may remain in the United States, the ores, when dug or detached from the lands under a mining-claim, are free from any lien, claim, or title of the United States, and, becoming personal property, are as such subject to State taxation in like manner as other personal property.

*Section 6, act of February 28, 1871, of Nevada legislature, construed—Mines and mining-claims distinguished.*—The words "mines or mining-claims," in the sixth section of the act of the legislature of Nevada of February 28, 1871, imposing a tax upon such ores, and making it "a lien on the mines or mining-claims from which the ores or minerals bearing gold or silver are extracted for reduction," were evidently intended to distinguish between cases in which the miner is the owner of the soil, and therefore has a perfect title to the mine, and those in which he works under a mining-claim, the title to the land remaining in the United States. In the first case, the tax is a valid lien on the mine itself; but in the second only upon his possessory right, under existing laws and regulations, to work and explore the mine. Such a claim is property in the fullest sense of the word. It is subject to a lien for taxes, and may be sold for non-payment of them, without infringing the title of the United States. (4 Otto, 762.)

Appeal from the circuit court of the United States for the district of Nevada.

Mr. Justice Miller delivered the opinion of the court.

This was a suit brought by appellant to enjoin the collector of taxes for Storey county, Nevada, from collecting a tax imposed by the law of that State upon the property of the Consolidated Virginia Mining Company, the appellant being a stockholder in the company and an alien subject of the Queen of Great Britain. The tax is by the State statute imposed upon the proceeds of the mine worked by the corporation, and is resisted on the ground that the title to the land from which the mineral is taken is in the United States, and it is not for that reason liable to State taxation.

The case is prepared and submitted to us on printed argument in the very last days of the term, and we are urged to decide it on the ground that it involves a question of vast interest to all the mining operations in the Pacific States, and is of vital importance to the State of Nevada, as it affects her largest source of revenue. In view of its importance, we should postpone the decision until next term, if the questions presented were either doubtful or difficult of solution. We think a very few words—all we can give to the subject at this late day—will show that it is neither.

It is very true that Congress has by statutes and tacit consent permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals, which are found in the lands belonging to the government, without exacting or receiving any

compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners as ascertained among themselves by the rules which have become the laws of the mining-districts as regards mining-claims. (See Revised Statutes, Title XXXII, chap. six, secs. 2318 to 2352.) But in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law on that subject. If the tax of the State of Nevada is in point of fact levied on this property right of the United States, we are bound by our previous decisions and by sound principle to hold that it is void. If, on the other hand, it is levied on property of the miner, and may be collected without affecting or embarassing the title of the United States to property which belongs to that government, then there is no ground for interference with the processes of the State in its collection. A few extracts from the statute of Nevada, showing the nature and character of the property on which the contested tax is imposed, and the manner of its enforcement and collection, will enable us to decide whether it belongs to the one or the other of these classes. We copy here the important sections of the act of February 28, 1871, imposing this tax:

"SECTION 1. All ores, tailings, and mineral-bearing material, of whatever character, shall be assessed for purposes of taxation for State and county purposes in the following manner: From the gross yield, return, or value of all ores, tailings, or mineral-bearing material of whatever character, there shall be deducted the actual cost of extracting said ores as minerals from the mine, the actual cost of saving said tailings, the actual cost of transportation of said ores, mineral-bearing material, or tailings, to the place of reduction or sale, and the actual cost of such reduction or sale, and the remainder shall be deemed the net proceeds, and shall be assessed and taxed as provided for in this act: *Provided*, That in no case whatsoever shall the whole amount of deductions allowed to be made in this section from the gross yield, return, or value of said ore, mineral-bearing material, or tailings exceed the percentage of gross yield, value, or return of such ore, mineral, or tailings, as hereinafter specified; on all ores, tailings, or mineral-bearing material, the gross yield or value of which is twelve dollars per ton or less, the whole amount of deductions shall not exceed ninety per cent. of such gross yield, return, or value; on all ores, tailings, or mineral-bearing material, the gross yield, value, or returns of which is over twelve and under thirty dollars per ton, the whole amount of deductions shall not exceed eighty per cent. of such gross yield, value, or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is over thirty dollars and less than one hundred dollars per ton, the whole amount of deductions shall not exceed sixty per cent. of such gross yield, value, or return; on all ores, tailings, or mineral-bearing material, the gross yield, return, or value of which is one hundred dollars per ton, or over, the whole amount of deductions shall not exceed fifty per cent. of such gross yield, return, or value: *Provided*, That an additional exemption of fifteen dollars per ton may be allowed on all ores, tailings, or minerals worked by the Freiburg process.

"SEC. 2. It shall be the duty of the several county assessors within this State to compare and complete quarterly, on or before the second

Monday in February, May, August, and November in each year, a tax list, or assessment roll, of the proceeds of the mines, alphabetically arranged, in a book furnished them by the board of county commissioners for that purpose, in which book shall be listed or assessed the proceeds of all mines in their respective counties, as provided in this act."

"SEC. 6. Every tax levied under the authority or provision of this act, on the proceeds of the mines, is hereby made a lien on the mines or mining-claims from which ores or minerals bearing gold or silver, or either, or any other valuable metal is extracted for reduction, which lien shall attach on the first days of January, April, July, and October of each year, for the quarter year commencing on those days respectively; and shall not be satisfied or removed until the taxes, as provided in this act, on the proceeds of the mines, are all paid, or the title to said mines or mining-claim is absolutely vested in a purchaser, under a sale for the taxes levied on the proceeds of such mines or mining-claims."

"SEC. 10. The collection of the tax authorized to be levied under this act shall be enforced in the same manner in which the tax on any other kind of personal property is enforced and collected."

What this manner of enforcement is, is to be found in sec. 110 of a previous statute, which reads as follows:

"At any time while the assessment roll of any quarter is in the hands of the assessor for collection, the assessor may seize upon the personal property, or so much thereof as may be sufficient to satisfy the taxes and costs, of any person, firm, corporation, association, or company, who shall neglect or refuse to pay such taxes for one week after such demand of the assessor or his deputy, and shall post a notice of such seizure, with a description of the property, and the time and place whereon it will be sold, in three public places in the township or precinct where it is seized, and shall at the expiration of five days proceed to sell at public auction, at the time and place mentioned in the notice, to the highest bidder for cash, a sufficient quantity of such property to pay the taxes and costs incurred."

From the first section of the statute we ascertain what it is that is taxed, namely, all the ores, tailings, or mineral-bearing material of whatever character, after deducting the actual cost of extracting said ores as mineral from the mines and other expenses, such as transporting them to the place of reduction, etc.

From this it is clear that it is the ore after it has been separated from the bed in which it is found, and its proceeds and products, which are taxed, and not the ore or mineral in the earth. Indeed, this latter idea is not advanced by any one, and it would be preposterous.

As we construe the statutes of the United States and the recognized rule of the government on this subject, the moment this ore becomes detached from the soil in which it is embedded it becomes personal property, the ownership of which is in the man whose labor, capital, and skill has discovered and developed the mine and extracted the ore or other mineral product. It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State, as any other personal property is.

The truth of this proposition is too obvious to need or admit of illustration or elaboration, and, as we have already said, the pressure of business does not admit of it.

In regard to the taxing of this personal property, and the mode of collecting it by sale as provided in the section last cited, it does not seem to us that there can be any reasonable ground for asserting that the United States has any interest in the tax or in the sale of the property taxed. It is, however, urged with more show of reason, that section six, which makes this tax "a lien on the mines or mining-claims from which the ores or minerals bearing gold or silver are extracted for reduction," is an interference with the right of property of the government in the lands in which the mineral remains unextracted.

An examination of the language we have quoted will show that it was carefully prepared to avoid this objection, and we think it does.

The use of the words "mines or mining-claims" is evidently intended to distinguish between the cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining-districts, and what is, as we have said, recognized by the act of Congress, as a mining-claim. In the first case, the statute makes the tax a lien on the mine, because the title to the mine is in the person who owes and should pay the tax. In the other, the tax is a lien only on the claim of a miner; that is, on his possessory right to explore and work the mine under the existing laws and regulations on the subject.

In the former case, of course, the United States has no interest to be protected, and the State is at liberty to declare and enforce such a lien for her taxes. In the latter, also, such right as the mining laws allow and as Congress concedes to develop and work the mines, is property in the miner, and property of great value. That it is so is shown most clearly by the conduct of the mining corporation, in whose interest this suit is brought, which, for the purpose of evading this tax, permits its investment in this mine, said to be worth from fifty to a hundred millions of dollars, to rest on this claim, this mere possessory right, when it could, at a ridiculously small sum compared to the value of the mine, obtain the government's title to the entire land, soil, mineral, and all. Those claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast States. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal Government. This claim may be sold, transferred, mortgaged, inherited, without infringing the title of the United States. Why may it not also be made subject to a lien for taxes, and the claim, such as it is, recognized by statute, be sold to enforce the lien? We see nothing in principle or in any interest which the United States has in the land to prevent it.

We are of the opinion that the decree of the circuit court dismissing the bill of appellant on demurrer was right; it is therefore affirmed.

Mr. Justice Field took no part in the decision of this case.

## SUPREME COURT OF THE UNITED STATES.

### JENNISON, EXECUTOR OF TITCOMB, *vs.* KIRK.

*Rights of owners of canals and ditches.*—The ninth section of the act of Congres of July 26, 1866, "granting the right of way to ditch and canal owners over the

public lands, and for other purposes," enacted: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowled by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage;" *Held*, 1st, that this section only confirmed to the owners of water-rights and of ditches and canals on the public lands of the United States the same rights which they held under the local customs, laws, and decisions of the courts prior to its passage; and, 2d, that the proviso conferred no additional rights upon the owners of ditches subsequently constructed; but simply renders them liable to parties on the public domain whose possessions may be injured by such construction.

The origin and general character of the customary law of miners stated and explained.

By that law the owner of a mining-claim and the owner of a water-right in California hold their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.

By that law a person cannot construct a ditch to convey water across the mining-claim of another, taken up and worked according to that law before the right of way was acquired by the ditch owner, so as to prevent the further working of the claim in the usual manner in which such claims are worked, nor so as to cut off the use of water previously appropriated by the miner for working the claim, or for other beneficial purposes.

*Damage by the hydraulic process.*—Accordingly, where the owner of a mining-claim worked by the method known as "the hydraulic process," cut and washed away a portion of a ditch so as to let out the water flowing in it, the ditch having been so constructed across the claim previously acquired as to prevent it from being further worked by that method, and to prevent the use of water previously appropriated by him; *Held*, that the cutting and washing away of the ditch, it having been done in order that the claim might be worked and the water used as before, was not an injury for which damages could be recovered.

Error to the supreme court of California.

Mr. Justice Field delivered the opinion of the court.

In 1873 the plaintiff's testator constructed a ditch or canal in Placer county, California, to convey the waters of a cañon and of tributary and intermediate streams, to a mining locality known as Georgia Hill, distant about seventeen miles, for mining, milling, and agricultural purposes, and for sale. The ditch was completed in December of that year, and immediately thereafter the waters of the cañon were turned into it. The ditch had a capacity to carry a thousand inches of water, and it is alleged that during the rainy season of the year in California, which extends from about the first of November to the first of April, the cañon, tributaries, and intermediate streams would supply that quantity, and during the dry season not less than one hundred inches. The intention of the testator, as declared on taking the initiatory steps for their appropriation, was to divert two thousand inches of the waters by means of a flume and ditch.

In its course to Georgia Hill, the ditch crossed a gulch or cañon in the mountains known as Fulweiler's gulch, the waters of which had been appropriated some years before by the defendant, who had constructed ditches to receive and convey them to a reservoir, to be used as needed.

One of these ditches in the gulch was intersected by the ditch of the testator, and the waters which otherwise would have flowed in it were diverted to his ditch. The defendant thereupon repaired and reopened his own ditch, turning into it the waters which had previously flowed in it, and, in so doing cut and washed away a portion of the ditch of the testator, so as to let out the waters brought down from the cañon above and from the intermediate streams. It is for alleged damages thus caused to the testator, and to restrain the continuance of the alleged injury to his ditch, and any interference with its use, that the present action was brought.

The defendant not only justified the cutting of the testator's ditch in the manner stated, because necessary for the repair and reopening of his own ditch, and to retain the waters of the gulch previously appropriated and used by him, but on the further ground that the ditch of the testator traversed mining-claims owned many years before by him, or those through whom he derived his interest, and would prevent their being successfully worked.

It appears from the answer, which the court finds to be correct in this particular, that for many years prior to this action, the defendant, or his grantors and predecessors in interest, had been in the possession of a portion of Fulweiler's gulch, extending from a point about 1,200 feet below the crossing of the testator's ditch to a point about 1,200 feet above it, including the bed of the gulch and fifty feet of its banks on each side; that during this period the ground was continuously held and worked for mining purposes, and as a mining-claim, in accordance with the usages, customs, and laws of miners in force in the district; that in working the claim and extracting the gold the method employed was what is termed "the hydraulic process," by which a large volume of water is thrown with great force through a pipe or hose upon the sides of the hills, and the gold-bearing earth and gravel are washed down, and the gold so loosened that it can be readily separated; and that the ditch of the testator traversed the immediate front and margin of this gold-bearing earth and gravel, rendering the same inaccessible from the outlets of the gulch, down which they would be washed, thus practically destroying, if allowed to remain, the working of the mining ground.

On the argument it was admitted that the defendant's right of way for his ditch was superior to the testator's right of way for the one owned by him, being earlier in construction, and the waters of the gulch being first appropriated; and, therefore, that the duty rested upon testator, and since his death upon his executor, to so adjust the crossings of the ditches as not to interfere with the full use and enjoyment, by the defendant, of his prior right. It was contended that such crossings had been so adjusted by the testator, but were destroyed by the defendant.

It was also admitted that the extension of the testator's ditch, at the place where it was constructed across the claim of the defendant, prevented the successful working of the claim; but as the land over which the ditch passed, and on which the claim is situated, is a portion of the public domain of the United States, it was contended that the right of way for the ditch was superior to the right to work the claim; and that such superior right was conferred by the ninth section of the act of Congress of July 26, 1866. That section enacted: "That whenever, by

priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purpose aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." (14 Stat., 253.)

There are some verbal changes in the section as re-enacted in the Revised Statutes, but none affecting its substance and meaning. (Revised Statutes, Section 2339.)

The position of the plaintiff's counsel is, that of the two rights mentioned in this section only the right to the use of water on the public lands, acquired by priority of possession, is dependent upon local customs, laws, and decisions of the courts; and that the right of way over such lands, for the construction of ditches and canals, is conferred absolutely upon those who have acquired the water-right, and is not subject in its enjoyment to the local customs, laws, and decisions. This position, we think, cannot be sustained. The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands. The section is to be read in connection with other provisions of the act of which it is a part, and in the light of matters of public history, relating to the mineral lands of the United States. The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population, within three or four years, from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them further than that they were situated in the Sierra Nevada mountains. Into these mountains the emigrants, in vast numbers, penetrated, occupying the ravines, gulches, and cañons, and probing the earth in all directions for the precious metals. Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines, distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as

to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, therefore an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes, was recognized as having, to the extent of actual use, the better right. The doctrines of the common law respecting the rights of riparian owners, were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through cañons and ravines to supply communities engaged in mining, as well as for agriculturalists and ordinary consumption. Numerous regulations were adopted, or assumed to exist from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining-claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years, from 1848 to 1866, the regulations and customs of miners, as enforced and moulded by the courts, and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866 no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed. In the first section it declared that the mineral lands of the United States were free and open to exploration and occupation by citizens of the United States, and those who had declared their intention to become citizens, subject to such regulations as might be prescribed by law and the local customs or rules of miners in the several mining-districts, so far as the same were not in conflict with the laws of the United States. In other sections it provided for acquiring the title of the United States to claims in veins or lodes of quartz-bearing gold, silver, cinnabar, or copper, the possessory right to which had been previously acquired under the customs and rules of miners. In no provision of the act was any intention manifested to interfere with the possessory rights previously acquired, or which might be afterwards acquired; the intention expressed was to secure them by a patent from the government. The Senator of Nevada, Hon. Wm. M. Stewart, the author of the act, in advocating its passage in the Senate, spoke in high

praise of the regulations and customs of miners, and portrayed in glowing language the wonderful results that had followed the system of free mining which had prevailed with the tacit consent of the government. The legislature of California, he said, had wisely declared that the rules and regulations of miners should be received in evidence in all controversies respecting mining-claims, and when not in conflict with the constitution or laws of the State or the United States, should govern their determination; and a series of wise judicial decisions had moulded these regulations and customs into "a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes." The miner's law, he added, was a part of the miner's nature. He had made it, and he trusted it and obeyed it. He had given the honest toil of his life to discover wealth, which, when found, was protected by no higher law than that enacted by himself under the implied sanction of a just and generous government. And the act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached.*

These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act.

Whilst acknowledging the general wisdom of the regulations of miners, as sanctioned by the State and moulded by its courts, and seeking to give titles to possessions acquired under them, it must have occurred to the author, as it did to others, that if the title of the United States was conveyed to the holders of mining-claims, the right of way of owners of ditches and canals across the claims, although then recognized by the local customs, laws, and decisions, would be thereby destroyed unless secured by the act. And it was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported, in its first clause, only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws, and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," cannot be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such rights as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed: it simply renders them liable to parties on the public domain whose pos-

*Cong. Globe, 1st session, 39th Cong., part IV, pp. 3225–3228.

sessions may be injured by such construction. In other words, the United States by the section said, that whenever rights to the use of water, by priority of possession, had become vested, and are recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water-rights, being recognized in the same manner, should be "acknowledged and confirmed;" but where ditches subsequently constructed injure, by their construction, the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the government to possessory rights acquired under the local customs, laws, and decisions of the courts.

This view of the object and meaning of the ninth section was substantially taken by the supreme court of California in the present case; it was adopted at an early day by the land department of the government, and the subsequent legislation of Congress, respecting mineral lands, is in harmony with it.*

By the customary law of miners in California, as we understand it, the owner of a mining-claim and the owner of a water-right enjoy their respective properties from the dates of their appropriation, the first in time being the first in right; but where both rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed. In the present case the plaintiff admits that it was incumbent upon the testator or himself to so adjust the crossing of the two ditches that the use of the testator's ditch should not interfere with the prior right of the defendant to the use of the water of the gulch; and it would seem that so far as the flow of the water was concerned this was done. Had there been nothing further in the case, the claim of the plaintiff would have been entitled to consideration. But there was much more in the case. The chief value of the water of the gulch was to enable the defendant to work his mining-claim by the hydraulic process. The position of the testator's ditch prevented this working, and thus deprived him of this value of the water and practically destroyed his mining-claim. No system of law with which we are acquainted tolerates the use of one's property in this way, so as to destroy the property of another. The cutting and washing away of a portion of the testator's ditch, by the defendant, this having been done "in the exercise, use, and enjoyment of his own water-rights in the usual and in a reasonable manner," as found by the court, and in order that his claim might be worked as before, was not, therefore, an injury for which damages could be recovered.

Judgment affirmed.

NOTE.—The customary law of miners, as stated in the opinion, is not applicable in California to controversies arising between them, or ditch owners, and occupants of the public lands for agricultural or grazing purposes. It has been the general policy of the State "to permit settlers in all capacities to occupy the public lands,

* Letter of Commissioner Wilson of November 23, 1869, Copp's U. S. Mining Decisions, 24; Acts of Congress of July 9, 1870, and May 10, 1872, Revised Stats., title 32, chap. 6.

and by such occupation to acquire the right of undisputed enjoyment against all the world but the true owner." (Tartar *vs.* Spring Creek Co., 5 Cal., 398.) But at an early day an exception was made to this policy in cases where the interests of agriculturists and of miners conflicted. By an act passed April 20, 1852, a right of action was given to any one settled upon the public lands for the purpose of cultivating or grazing, against parties interfering with his premises, or injuring his lands, where the same were designated by distinct boundaries, and did not exceed one hundred and sixty acres in extent; with a proviso, however, that if the lands contained mines of precious metals, the claim of the occupant should not preclude any persons desiring to do so from working the mines "as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes." (Statutes of 1852, p. 158.)

Under this act, the supreme court of the State held that miners, for the purpose simply of mining, could enter upon the land thus occupied, but that the act legalized what would otherwise have been a trespass, and could not be extended by implication to a class of cases not specially provided for. Accordingly, ditches constructed over lands thus held, without the consent of the occupant, though designed to convey water to mining localities for the purpose of mining, were held to be nuisances, and upon the complaint of the occupant were ordered to be abated. (Stoakes *vs.* Barrett, 5 Cal., 37; McClinton *vs.* Bryden, *Ibid.*, 97; Fitzgerald *vs.* Urton, *Ibid.*, 308; Burge *vs.* Underwood, 6 *Ibid.*, 46; Wermer *vs.* Lowery, 11 *Ibid.*, 104.)

Since these decisions, there has been some legislation in the State, permitting water to be conveyed, upon certain conditions, across the lands of others. Such legislation, if limited to merely regulating the terms upon which possessory rights subsequently acquired on the public lands in the State may be enjoyed in the absence of title from the United States, may not be open to objection.

WATER RIGHTS ON THE PACIFIC COAST.

*References in Atchison vs. Peterson*, (20 *Wall.*, 507.)

Hill *vs.* Smith, 27 Cal., 476; Tyler *et al. vs.* Wilkinson *et al.*, 4 Mason, 397; Irwin *vs.* Phillips, *et al.*, 5 Cal., 140; Butte Canal & Ditch Co. *vs.* Vaughn, 11 Cal., 143; Ortman *et al. vs.* Dixon *et al.*, 13 Cal., 33; Lobdell *vs.* Simpson *et al.*, 2 Nevada, 274.

*References in Basey et al. vs. Gallagher*, (20 *Wall.*, 670.)

Thorp *et al. vs.* Freed *et al.*, 1 Montana, 693; Williams *vs.* Morland, 2 Barnewald and Cresswell, 269; Liggings *vs.* Inge, 7 Bingham, 692; Irwin *vs.* Phillips *et al.*, 5 Cal., 140; Bear River Co. *vs.* New York M. Co., 8 Cal., 327; Butte Canal Co. *vs.* Vaughn, 11 Cal., 143; McDonald *et al. vs.* Bear River Co., 13 Cal., 220; Phœnix Water Co. *vs.* Fletcher *et al.*, 23 Cal., 481; Hill *vs.* Smith, 27 Cal., 476; Lobdell *vs.* Simpson *et al.*, 2 Nevada, 274; Ophir Mining Co. *vs.* Carpenter, 4 Nevada, 534; Hobart *vs.* Ford, 6 Nevada, 77; Dalton *vs.* Bowker, 8 Nevada, 190; Ortman *et al. vs.* Dixon *et al.*, 13 Cal., 33; Davis *et al. vs.* Gale, 32 Cal., 26; Smith *vs.* O'Hara *et al.*, 43 Cal., 371; Woolman *et al. vs.* Garringer *et al.*, 1 Montana, 535; Caruthers *et al. vs.* Pemberton *et al.*, 1 Montana, 111; Thorp *vs.* Woolman, 1 Montana, 168; Atchison *et al. vs.* Peterson *et al.*, 1 Montana, 561; Tartar *vs.* Spring Creek Water and Mining Co., supreme court Cal., 1855, 5 Cal., 395. See also Broder *vs.* Water Co., 11 Otto, 274; Osgood *vs.* El Dorado W. & M. Co., 56 Cal., 571; Hobart *vs.* Wicks, 15 Nevada, 418; Fabian *vs.* Collins, 3 Mont., 215.

## SUPREME COURT OF THE UNITED STATES.

MORTON *vs.* STATE OF NEBRASKA.

*Salt springs reserved.*—The policy of the government, since the acquisition of the Northwest Territory, and the inauguration of our land system, to reserve salt springs from sale, has been uniform. This policy has been applied to the "Louisiana Territory," acquired by us from France in 1803, and probably would apply to the Territory of Nebraska on general principles. Whether or not it does apply, under the act of July 22, 1854, "to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska," it applies at least so far as to render void an entry where the salines at the time had been noted on the field-books, were palpable to the eye, and were not first discovered after entry.

*Void patents.*—Patents for land which has been previously reserved from sale are void.

*Vested rights.*—Where an act of Congress speaks of "vested rights," protecting them, it means rights lawfully vested. Hence, it does not protect a location made on public land reserved from sale.

Error to the supreme court of Nebraska.

Morton sued certain tenants of the State of Nebraska, in ejectment, to recover three hundred and twenty acres of salt land—*salines*—in the said State; a State formed, as every reader of these volumes is aware, out of that vast region formerly known as the Territory of Louisiana, and purchased in 1803 by us from France. The land in question was palpably saline, so incrusted with salt as to resemble snow-covered lakes. The saline in question was noted on the field-books, but these notes were not transferred to the register's general plats. The State intervened in the suit, and by its own request was made a defendant.

The plaintiff based his title under locations of military bounty-land warrants at the land-office in Nebraska City, in September, 1859. These warrants were issued by virtue of the military bounty-land act of September 28, 1850, which declared that such warrants might be located at any land-office of the United States, upon any of the public lands in such district *then subject to private entry*. The locators of the warrants, it appeared, before they made their entries, were told that the lands were salines. The State now set up that the locations were without authority of law, because the lands being saline lands were not subject to such entry.

The question thus was, whether, in Nebraska, saline lands were open to private entry; or, more strictly, whether they were so under circumstances such as those above stated.

It was not denied by the plaintiff that the practice of the Federal Government, as exhibited by many acts of Congress, (which being referred to in the opinion of the court, need not here, by the reporter, be particularized,) from an early date had been to exclude this sort of land, with certain other sorts, from public sale generally. It had done so confessedly from the Northwestern Territory and from the Territory of Orleans, the now State of Louisiana. But the defendants conceived—and such was their position—that under the statutes regulating the matter in *Nebraska*, this was not so.

The matter was to be settled by certain acts of Congress, standing, perhaps, by themselves; or, if their language was not clearly enough applicable to the district of Nebraska by such acts, read by the light of the policy of the government and its numerous enactments on the main subject.

The first act which bore directly upon the matter was an act of March 3, 1811,* "providing for the final adjustment of claims to lands and for the sale of the public lands in the Territory of Orleans and Louisiana." This act created a new land district, and authorized the President to sell any surveyed public lands in the Territory of Lousiana, with certain exceptions named.

"And with the exception also of the *salt springs* and lead mines, and lands contiguous thereto."

Next came an act, approved July 22, 1854,† more immediately bearing on the matter: "An act to establish the offices of surveyor-general of

* 2 Stat. at Large, 665, §10. † *Id.* 308.

New Mexico, Kansas, and *Nebraska*, to grant donations to actual settlers therein, and for other purposes."

This was an act of thirteen sections, and, as its title shows, relating to three different Territories.

The first three sections related, without any question, exclusively to the Territory of New Mexico.

The first of them authorized the appointment of a surveyor-general for *that* Territory, with the usual powers and obligations of such officers.

The second made a donation of a quarter-section of land to all white males residing in *it*, who had declared an intention, prior to January 1, 1853, to become citizens; and also (on condition of actual settlement, etc.) to every white male citizen above twenty-one years of age who should remove or have removed there between January 1st, 1853, and January 1, 1858.

The third authorized a patent for *such* land to issue.

Then came in a fourth section, in these words:

"*None of the provisions of this act* shall extend to mineral or *school* lands, *salines*, military or other reservations, or lands settled on or occupied for purposes of trade and commerce, and not for agriculture."

This fourth section, as the reader will observe, does not in terms refer to the Territory of New Mexico, but says *none of the provisions of the act*, etc.

However, the fifth section enacts "that sections 16 and 36 in each township shall be, and the same are hereby, reserved for the purpose of being applied to schools in the *said Territory;* that is to say, the Territory of New Mexico; and the sixth reserves a quantity of land equal to two townships, for a university *there*."

The fourth section, therefore, as the reader will have noted, is interposed between sections which relate exclusively to the Territory of New Mexico; though it, itself, does not in terms so exclusively relate. The fifth sections also, as he will have noted, makes a reservation for schools; a matter which the fourth section in some way apparently had also legislated upon.

Then came a seventh section, enacting "that any of the lands not taken under the provisions of this act" are subject to the operation of the pre-emption act of 4th September 1841.* [An act which by its tenth section authorizes certain persons to enter one hundred and sixty acres at the minimum price, and enacts: "That no lands on which are situated any known salines or mines shall be liable to entry under and by virtue of the provisions of this act."]

Section eight authorizes the surveyor-general to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and lands covered thereby are to be reserved from sale.

Section nine gives the Secretary of the Interior power to "issue all needful rules and regulations for fully carrying into effect *the several provisions of this act*."

Then comes, for the first time, in section ten, a *specific* reference to Nebraska. This tenth section authorizes the appointment of surveyors-

* 5 Stat. at Large, 456.

general for Nebraska and Kansas, with the usual powers and obligations of such officers. It authorizes them to locate their offices at certain places, etc.

The eleventh section directs surveys in the said Territories.

The twelfth subjects "all the lands to which the Indian title has been or shall be extinguished within said Territories of Kansas and Nebraska to the operation of the pre-emption act of 4th September, 1841;" the pre-emption act mentioned above in the seventh section. And the thirteenth makes two new land districts, authorizes for these two districts the appointment of registers and receivers, and concludes the statute with an enactment thus:

"And the President is hereby authorized to cause the surveyed lands to be exposed to sale, from time to time, *in the same manner* and upon the same terms *as the other public lands of the United States.*"

Whether, therefore, this section four, interposed as it is between sections relating exclusively to New Mexico, did, notwithstanding its general language, bear on the Territory of Nebraska, was one question raised by the plaintiff in the case, who denied that it did or could. He asserted that it meant "none of the *foregoing* provisions," etc.; that is to say, the provisions in section two about the *donation* of lands.

The State, on the other hand, insisting that it did apply to the other two Territories mentioned in subsequent sections of the act, asserted also that whether it did or did not was unimportant, since by the twelfth the lands in Nebraska were subjected to the provisions of the pre-emption act of 1841, which exempted "all *known* salines;" within which class, as it happened, those in question came.

The State, however, relied also on two other acts, subsequent to that already set forth, of July 22, 1854. The acts were thus:

1. An act of the 3d of March, 1857,* "to establish three additional land districts in the Territory of Nebraska."

This act re-arranged the land districts of Nebraska, authorized the appointment of officers for them, and by one section enacted:

"That the President is hereby authorized to cause the public lands in said districts to—with the exception of such as *may have been or may be reserved for other purposes*—be exposed to sale in the same manner as other public lands of the United States."

2. An act of the 19th of April, 1864,† "to enable the people of Nebraska to form a constitution and State government, and for the admission of such State into the Union," etc.

This act enacts:

"Section 11. That all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use; the said land to be selected by the governor thereof," etc.

Under this act (after the admission of Nebraska as a State into the Union) its governor made a selection of twelve salt springs, the ones now in question being of the number.

This act, however, contained a proviso which the plaintiffs conceived covered the present case, and destroyed the value to the State (if it had any) of the main enactment. The proviso was thus:

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*11 Stat. at Large, 186. †13 *Ibid.*, 47.

"*Provided*, That no salt spring or lands, the right whereof is now vested in any individual or individuals, shall by this act be granted to said State."

It may here be remarked that the plaintiffs had obtained certificates of entry for the lands in controversy, and patents for them had been issued. The patents were transmitted from the General Land Office at Washington to the local office in Nebraska.

Before their delivery, however, the Commissioner of the General Land Office, ascertaining that the lands patented were saline lands, and not agricultural, recalled the patents and cancelled the location.

The court below gave judgment for the State. From that judgment the other side brought the case here.

In behalf of the plaintiffs in error, (plaintiffs also below,) it was argued that the act of July 22, 1854, though purporting to be one statute, and in form such, was obviously in fact two statutes; the first statute coming *to* the tenth section, and relating exclusively to New Mexico; the other, running from the beginning of that tenth section to the end of the thirteenth, and relating exclusively to Kansas and Nebraska. The case was the case of two separate bills, referring to distinct but cognate subjects tacked together, and passed through Congress as one statute; a very familiar case in the legislation of Congress, or of one bill where two cognate and distinct subjects were acted on in one bill; one subject in the first part and the other in the last. Viewing the statute in this light, the fourth section of the first act could not be made to overlap and cover any portion of the second act.

But if this were not the obvious history or character of the statute, the language of the fourth section is not the language of "reservation." The word "reserved" or "reservation" does not occur in it. The section was, therefore, to be confined to operating upon what immediately precedes it; that is to say, it was to be read as a prohibition upon the occupancy of the mineral, saline, and school lands of New Mexico, by settlers under the donation clause of the act contained in sections two and three preceding. New Mexico in 1854 was a distant, and, agriculturally considered, a sterile Territory; though one having very rich mines and salines. The object of Congress was to invite *agricultural* settlers into it. Donations of agricultural lands to such persons were requisite to secure this object; and even such donations hardly secured it.

But donations of the invaluable mineral lands and salines there were not at all requisite to invite thither the enterprising miner and saltmaker. These persons would go there if they could purchase at a private sale or lease the mines or salines. Congress, therefore, would have been without excuse in giving away *these* mines and salines.

The fourth section is, therefore, not to be regarded as a reservation at all, but as a provision withdrawing mines, salines, and the other sorts of land named in it, from the operation of the donation clauses preceding it.

Any other construction of the section makes the statute tautologous. The section, it will be noted, operates in whatever way it does operate, on *school* lands as much as on salines. If it be taken as a reservation operating over subsequent parts of the act—a reservation, generally, on school lands—then as to New Mexico it makes the identical enactment

which is made in the fifth section. This, as to that act, is a *reductio ad absurdum*. While a similar sort of demonstration appears in regard to the Territories of Nebraska and Kansas, when you advert to the fact revealed by a reference to the statute book, that a previous act,* the act of May 30, 1854, "to organize the Territories of Nebraska and Kansas," by sections sixteen and thirty-six, reserves school lands in almost identical language for *them*. †

The learned counsel argued further that the proviso in the eleventh section of the act of April 11, 1864, was a plain recognition of a vested right—one made by its own patent—in the plaintiff.

They argued also that there having been no exhibition or evidence of salines apparent in the receiver's general plats, no knowledge of any was properly fixed on the plaintiff, and that the patents having once passed the seals of the General Land Office at Washington, the subsequent revocation was void. The plaintiffs were thus possessed of a legal title, and had a right to recover in ejectment.

Mr. Justice Davis delivered the opinion of the court.

The policy of the government since the acquisition of the Northwest Territory and the inauguration of our land system, to reserve salt springs from sale, has been uniform. The act of 18th May, 1796,‡ the first to authorize a sale of the domain ceded by Virginia, is the basis of our present rectangular system of surveys. That act required every surveyor to note in his field-book the true situation of all mines, salt licks, and salt springs, and reserves for the future disposal of the United States a well-known salt spring on the Scioto river, and every other salt spring which should be discovered.

These reservations were continued by the act of May 10, 1800,§ which created a land district in Ohio, with registers and receivers, and authorized sales by them; the preceding act having recognized the governor of the Northwest Territory and the Secretary of the Treasury as the agents for the sale of the lands. And the same policy was observed when provision was made in 1804 for the disposal of the lands in the Indian Territory, (embracing what is now Illinois and Indiana.)‖ It was then declared "that the several salt springs within said territory, with as many contiguous sections to each as shall be deemed necessary by the President, shall be reserved for the further disposal of the United States." Without referring particularly to the different acts of Congress on the subject, it is enough to say that all the salines in the Virginia cession were reserved from sale, and afterwards granted to the several States embraced in the ceded territory. Congress, in the disposition of the public lands in the Mississippi Territory,¶ and in the Louisiana purchase, preserved the policy which it had applied to country obtained from Virginia. Over all the territory acquired from France the general land system was extended. The same rules which were prescribed by law

* 10 Stat. at Large, 283, 289.

† The language is, in the case of each Territory:

"Sections numbered 16 and 36 in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory."

‡ 1 Stat. at Large, 464. § 2 *Id.*, 73. ‖ 2 Stat. at Large, 277.

¶ 2 *Ib.*, 548; 3 *Id.*, 489.

for the survey and sale of lands east of the Mississippi river were transferred to this new acquisition.* At the first sale of lands in this region, which the President was authorized to make, salt springs and lands contiguous thereto were excepted.† And this exception was continued when, in 1811, a new land district was created. Prior to this time no portion of the country north of the State of Louisiana had been brought into market. The act of March 3, 1811, authorized this to be done; but the President, in offering the lands for sale, was directed to except salt springs, lead mines, and lands contiguous thereto, which were reserved for the future disposal of the States to be carved out of this immense territory which included the present State of Nebraska.‡ And so particular was Congress not to depart from this policy, that in giving lands, in 1815, to the sufferers by the New Madrid earthquake, every lead mine and salt spring were excluded from location. Indeed, in all the acts creating new land districts in the territory now occupied by the States of Arkansas and Missouri, the manner of selling the public lands is not changed, nor is a sale of salines in any instance authorized. On the contrary, they incorporate the same reservations and exceptions which are contained in the act of March 3, 1811. In all of them the act of 18th May, 1796, is the rule of conduct for all surveyors-general and their deputies, as the act of 10th May, 1800, is the rule for all registers, requiring them to exclude from sale all salt springs, with the sections containing them.

In this state of the law of saline reservations, the act of 22d July, 1854 was passed. It is by no means certain that the act of March 3, 1811, did not work the reservation of every saline in the Louisiana purchase; but without discussing this point, it is enough to say that the act of 1854 leaves no doubt of the intention of Congress to extend to the territory embraced by the States of Kansas and Nebraska the same system that had been applied to the rest of the Louisiana purchase. There was certainly no reason why a long-established policy, which had permeated the land system of the country, should be abandoned. On the contrary, there was every inducement to continue, for the benefit of the States thereafter to be organized, the policy which had prevailed since the first settlement of the Northwestern Territory. In the admission of Ohio and other States, Congress had made liberal grants of land, including the salt springs. This it was enabled to do by reserving these springs from sale. Without this reservation it is plain to be seen there would have been no springs to give away, for every valuable saline deposit would have been purchased as soon as it was offered for sale. An intention to abandon a policy which had secured to the States admitted before 1854 donations of great value cannot be imputed to Congress, unless the law on the subject admits of no other construction.

But the law of 1854,§ instead of manifesting an intention to abandon this policy, shows a purpose to continue it. It was the first law under which lands were surveyed in Nebraska, offered at public sale, and so made subject to private sale by entry. By it surveyors-general for New Mexico, and for Kansas and Nebraska, were appointed, with the usual powers and duties of such officers. And although there are provisions

* 2 Stat. at Large, 324. † 2 *Ib.*, 391. ‡ 2 Stats. at Large, 665. § 10, *Ib.*, 308.

relating to New Mexico applicable to that Territory alone, yet the leading purpose of this act was to bring into market, as soon as practicable, the lands of the United States in all of these Territories. In New Mexico this could not be done as soon as in Kansas, or Nebraska, on account of the policy adopted of donations to actual settlers, who should remove there before the 1st of January, 1858, and because of the necessity of segregating the Spanish and Mexican claims from the mass of the public domain. For this reason, doubtless, local land-offices were not created in New Mexico, but they were in Kansas and Nebraska, and registers and receivers appointed, with the powers and duties of similar officers in other land-offices of the United States. And the President was authorized to cause the lands, when surveyed, to be exposed to sale, from time to time, in the same manner, and upon the same terms and conditions, as the other public lands of the United States.

If there were no other provisions in the law that we have enumerated, we should hesitate to say, in view of the limitation on sales prescribed by law wherever public lands had been offered for sale, that they did not of themselves work a reservation of the land in controversy. In conducting the public sales the register always reserved salines, as it was his duty to do, when marked on the plats; and this was never omitted except by the neglect of the surveyors-general, or their deputies. But the fourth section of the act removes all doubt upon that subject. That section declares that none of the provisions of this act shall extend to mineral or school lands, *salines*, military, or other reservations, or lands settled on or occupied for the purposes of trade and commerce.

It is contended that this section applies to the donations, conceded in the preceding sections, to actual settlers in New Mexico. But why make this restriction? To do it would require the importation of the word (foregoing,) so that the section would read, none of the(foregoing) provisions shall extend to salines of mineral lands. There is no authority to make this importation, and in this way subtract from the general words of the section. The language of the section is imperative, and leaves no room for construction. Besides, why should an intention be imputed to Congress to exclude actual settlers from saline lands, but leave them open to private entry by speculators? The legislation upon the subject of public lands has always favored the actual settlers, but the construction contended for would discriminate against them, and in favor of a class of persons whose interests Congress has never been swift to promote.

Apart from this, however, the purpose which Congress had in view is to be found in the unbroken line of policy in reference to saline reservations, from 1796 to the date of this act. To perpetuate this policy, and apply it equally to all the lands of the three Territories, was the controlling consideration for the incorporation of the section; and although the words of the section are loose and general, their meaning is plain enough when taken in connection with the previous legislation on the subject of salines. It cannot be supposed, without an express declaration to that effect, that Congress intended to permit the sale of salines in Territories soon to be organized into States, and thus subvert a long-established policy by which it had been governed in similar cases.

If anything was needed to show that the fourth section did reserve salines from sales, it can be found in the act of the 3d of March, 1857,* re-arranging the land districts in Nebraska. This act excepts from sale such lands "as may have been reserved." This is a declaration that lands had been reserved, and obviously it is a legislative construction of the fourth section of the act of 1854, for nowhere else, except by implication, had there been reservations of any sort in the Territory of Nebraska.

Besides this, the Nebraska enabling act of April 10, 1864,† affords still further evidence that the act of 1854 was intended to reserve salines. The purpose of reserving them was to preserve them for the use of the future States, and no State had been organized without a grant of salt springs. In some of the States the grant was all within their boundaries, but on the admission of Missouri, and since, the number was limited to twelve. This number, with a certain quantity of contiguous lands, were granted to Nebraska on her admission. In doing this Congress must have assumed that the springs had been reserved from sale, for if this had not been done, the presumption is there would have been nothing for the grant to operate upon. It may be true that lands only fit for agriculture will remain a long time unentered, but this would never be the case with lands whose surface was covered over with salt. It would be an idle thing to make a grant of such lands, if there had been a previous right of entry conceded to individuals. This was in the mind of Congress, and induced the reservation in the act of 1854, by means of which Nebraska could be placed on an equal footing with other States in like situation.

But it is said the locations in question are ratified by the proviso to the section granting the salt springs. This proviso was as follows: "Provided that no salt springs or lands, *the right whereof is now vested in any individual* or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said State." This provision, with an unimportant change in phraseology, was first introduced into the enabling act for Missouri,‡ and exactly similar provisions with the one in question were inserted in the acts relating to Arkansas and Kansas.§ The real purpose of the proviso is to be found in the situation of the country embraced in the Louisiana purchase. The treaty of Paris of April 30, 1803, by which the "province of Louisiana" was acquired, stipulated for the protection of private property. This comprehended titles which were complete as well as those awaiting completion,¶ and Congress adopted the appropriate means for ascertaining and confirming them. They were numerous and of various grades, and covered townsites and every species of lands. In Missouri, as the records of this court show, they were quite extensive, and when she was admitted into the Union many of these titles were perfect, and still a large number imperfect.

In this condition of things Congress thought proper, in granting the salt springs to the State, to say that no salt springs, *the right whereof now is* or shall be confirmed or adjudged to any individual, shall pass under the grant to the State. Whether this legislation was necessary

* 11 Stat. at Large, 186. † 13 *Id.*, 47. ‡ 3 Stat. at Large, 547, § 6.
§ 5 *Id.*, 58; 12 *Id.*, 126. ¶ Soulard *vs.* U. S., 4 Peters, 511.

to save salt springs claimed under French treaty, is not important to determine; but manifestly it had this purpose in view, and nothing more. It could not refer to salt springs not thus claimed, because all entry upon them was unlawful, on account of previous reservation. It speaks of confirmations which had been made and those which were awaiting governmental action, and in this condition were all the titles the United States were bound to protect.

Although the words employed in the first division of the proviso to the saline grant to Nebraska are not the same as those used in the Missouri grant, they mean the same thing. There can be no difference between a right which has been confirmed and one which is now vested. Both are perfect in themselves, and refer to completed claims, while the last division in each proviso has reference to claims in course of completion, but not finally passed upon. This proviso can have little significance in the enabling act of Nebraska, or indeed in many other enabling acts, but Congress doubtless thought proper to introduce it out of the superabundance of caution, as there could be no certainty that in purchased or conquered territory, however remote from settlement, there might not be private claims protected by treaty stipulations, to which it would be applicable. It cannot be invoked, however, for the protection of the plaintiffs. When a vested right is spoken of in a statute, it means a right lawfully vested, and this excludes the locations in question, for they were made on lands reserved from sale or entry. If Congress had intended to ratify invalid entries like these, they would have used the language of ratification. Instead of doing this, the language actually employed negatives any idea that Congress intended to give validity to any unauthorized location on public lands.

The pre-emption act of the 4th of September, 1841,* declares that "no lands on which are situated *any known* salines or mines shall be liable to entry;" differing in this respect from the acts of 1796 and 1854, which reserves every "salt spring," and "salines." The salines in this case were not hidden, as mines often are, but were so encrusted with salt that they resembled "snow-covered lakes," and were consequently not subject to pre-emption. Can it be supposed that a privilege denied to pre-emptors in Nebraska was conceded in the act of 1864 to persons less meritorious?

It appears by the record, that on the survey of the Nebraska country, the salines in question were noted on the field-book, but these notes were not transmitted to the register's general plats, and it is argued that the failure to do this gave a right of entry. But not so, for the words of the statute are general, and reserve from sale or location *all* salines, whether marked on the plats or not.

What effect the statute might have on salines hidden in the earth, not known to the surveyor or locator, but discovered after entry, may become a question in another case. It does not arise in this. Here, the salines were not only noted on the field-books, but were palpable to the eye. Besides this, the locators of the warrants, before they made their entries, were told of the character of the lands. Indeed, it is quite clear that the lands were entered solely on account of the rich deposits of salt which they were supposed to contain.

* 5 Stats. at Large, 456.

It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved; and this want of power may be proved by a defendant in an action at law.

Judgment affirmed. (21 Wallace, 660–675.)

## *b.* DIGEST OF COURT DECISIONS.

### ABANDONMENT.

**What constitutes—Intention.**—An abandonment can only take place where the occupant leaves the land free to the appropriation of the next comer, whoever he may be, without any intention to repossess or reclaim it for himself, and regardless and indifferent as to what may become of it in the future. (Richardson *vs.* McNulty *et al.*, 24 Cal., 339. Myers *vs.* Spooner, 55 Cal., 257.)

**Law and fact—Assessment.**—Abandonment is a mixed question of law and fact. If in fact, a person intend to give up his mining-claim and quit paying assessments in pursuance of that intention, it is an abandonment in fact. (Oreamuno *vs.* Uncle Sam G. and S. M. Co., 1 and 2 Nev., 179; Doak *vs.* Brubaker, 1 Nev., 217; Weill *vs.* Lucerne M. Co., 11 Nev., 200.)

**Local rules—Intention.**—Abandonment in its common-law sense is purely a question of intention. An abandonment takes place when the ground is left by the locator without any intention of returning or making any future use of it, independent of any mining rule or regulation. (St. John *vs.* Kidd, 26 Cal., 263; Mallett *vs.* U. S. M. Co., 1 Nev., 194.)

**Statements showing intention.**—The sayings of a party alleged to have abandoned are evidence in his favor as disproving an intention to abandon. (Noble *vs.* Sylvester., 42 Vt., 146.)

**Evidence—Judgment roll.**—In an action to recover possession of a mining-claim, where the defence is an abandonment of the claim by the plaintiff, the judgment roll in an action brought by the plaintiff against third parties to recover possession of the same ground, and in which plaintiff recovered judgment, is admissible in evidence to rebut the presumption of abandonment. (Richardson *vs.* McNulty *et al.*, 24 Cal., 339.)

**Statute of limitations.**—Lapse of time short of the statute of limitations is alone no proof of abandonment. (Mallett *vs.* Uncle Sam M. Co., 1 Nev., 194; Partridge *vs.* McKinney, 10 Cal., 181.)

**Intention—Evidence.**—As to support the plea of abandonment it must appear from the evidence that there was a leaving of the claim, without any intention of returning or making any further use of it, so it is competent for the opposite party to prove, in rebuttal, any acts explanatory of the leaving which tend to show that it was not accompanied with an intention not to return. (Bell *vs.* Bed Rock T. and M. Co., 36 Cal., 214.)

**Belief before entry.**—In the trial of an issue as to whether mining ground had been abandoned by the plaintiff before the defendant's entry, the fact that the defendant *believed* the mine had been abandoned by the plaintiff when he entered is not to be taken into consideration by the jury in determining the issue. (Stone *vs.* Geyser Q. M. Co., 52 Cal., 315.)

**Expenditure — Hostile Indians — Tools.**—Where a party was driven away from his mine by hostile Indians, left his tools in an adjacent mine, and did not return prior to a second location by another party, for the reason that he supposed the Indian hostilities continued because of the required expenditures of money, and because he believed he had done sufficient work upon the mine to hold it: *Held*, That there was not that intent necessary to constitute abandonment. (Morenhaut *vs.* Wilson, 52 Cal., 263.)

**Estoppel.**—Evidence of matter in the nature of estoppel, as the acquiescence by silence in a sale of the premises by another, is not admissible in support of an allegation in abandonment. Estoppel is not an element in abandonment. (Marquart *vs.* Bradford, 43 Cal., 526.)

**Changes in location notice—Question of estoppel.**—The changes as made in the notice of location after re-

cord, did not show any intention on the part of the locators of the Paymaster mine to abandon it, and the facts of this case do not present any question of estoppel. (Gleeson *vs.* Martin White M. Co., 13 Nevada, 442.)

**Stopping work.**—Not to work a mining-claim may be a circumstance of some weight, tending to show abandonment; and this abandonment of a claim, resting for validity only upon possession, may be sufficient to defeat the title. (McGarrity *vs.* Byington, 12 Cal., 431.)

**Non-user.**—The inference of abandonment of a right from *non-user* is not applicable to the case of mines. (Seaman *vs.* Vawdrey, 16 Vesey, 390.)

**Possession—Good faith.**—The question of abandonment can never arise, except where there has been possession, and then the question is simply, whether the possessor intended to return, and whether he intended to return in good faith or bad faith. (Stone *vs.* Geyser Q. M. Co., 52 Cal., 315.)

**Vacancy in possession.** — When an abandonment takes, a vacancy in the possession is created, and without such vacancy no abandonment can take place. (Richardson *vs.* McNulty, 24 Cal., 339.)

**Possession—Gift.**—If the possession of the occupant be continued in another, by the expression of a wish or desire of the occupant to another that he succeed to the possession, and he thereupon takes possession, a gift is the result—there is no vacancy in the possession, and, consequently, no abandonment. (Idem.)

**Statute of limitations.** — Abandonment may arise from a single act or a series of acts, and a party having once abandoned his claim, will not be permitted to come in within the time allowed for commencing civil actions to re-assert his right, or resume his claim, to the prejudice of those who may have in the meantime appropriated it. (Davis *vs.* Butler, 6 Cal., 511.)

**Sale—Gift.**—The occupant may part with his interest by selling it, or giving it to another, or by any other mode authorized by law, or he may abandon it. (Idem.)

**Failure to work.**—The failure to perform the amount of work on a mining-claim required by the local mining laws or regulations established and in force in the district where the claim is located, amounts to an abandonment of the claim, and thereupon it may be occupied and appropriated by another. (Depuy *vs.* Williams, 26 Cal., 309.)

**Water and tailings.**—If miners engaged in washing their mining-claims with water, abandon the water and tailings which pass from their mining-grounds, any other persons may appropriate the same to their own use, and their right to the water and tailings is contingent on the fact of continual abandonment; but it does not become obligatory on the persons abandoning to continue to do so, even though other persons, encouraged by the circumstance of abandonment for a time, have incurred the expense of constructing flumes to use the water and tailings abandoned. (Dougherty *vs.* Creary, 30 Cal., 290.)

**Tailings—How indicated.**—To suffer the tailings to flow where they list, without obstructions to confine them within the proper limit, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to this rule. If no artificial obstruction is required to confine them within the proper limits, then none is necessary. (Jones *vs.* Jackson, 9 Cal., 237.)

**Re-location—Inchoate right pending development.**—While holding possession for the purpose of making the development required by law, the locator's right to the lode is complete, and it cannot be conveyed except by deed. It may, nevertheless, be lost by abandonment or by voluntarily yielding the possession to another, which is the same thing. And so if the locator admit another to the possession with him, this will amount to an abandonment *pro tanto*, and a retaking by the party admitted, upon which they will become interested in the lode, jointly or otherwise, according to the terms of their agreement. In these particulars the rule is the same when applied to the re-location of an abandoned claim. (Murley *vs.* Ennis, 2 Col., 300.)

**Jury—Instructions of the court.**—Where the court instructed the jury that "where an abandonment is sought to be established by the act of the party, the intention alone governs; and if such party leave a mining-claim, with the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years; provided there was no rule, usage, or custom of miners of so notorious a character as to raise a presumption of an intention to abandon: *Held*, That

the question of abandonment was fairly left to the jury. (Waring *vs.* Crow, 11 Cal., 366.)

**Failure to work and notice.**—If the local mining laws of a district provide that, on a failure to work and notice a claim as required by the mining laws, the claim shall be considered as abandoned, a failure to comply with such laws is an abandonment of the claim, and it is open to location as vacant ground. (Strang *vs.* Ryan, 46 Cal., 33.)

**Pleadings—Evidence admitted.**—To an action for the possession of a mining-claim, the defendant pleaded in defence a forfeiture of the same by the plaintiffs, under the mining rules and regulations of the district embracing the claim. Certain testimony tended to prove that the plaintiffs, or their grantors, removed all tools and implements of mining, and had ceased to work the mine. The plaintiffs offered to prove that about nine months before suit brought, one W., on behalf of the defendant, offered to purchase of them said claim, and that they refused to sell: *Held*, First, that under the defendant's denial of plaintiff's title, evidence of abandonment by plaintiffs was admissible; second, that as said evidence tended to prove abandonment, it was equally relevant under both defences; and third, that as said testimony offered by the plaintiffs tended to disprove abandonment, it should have been received. (Bell *vs.* Bed Rock T. & M. Co., 36 Cal., 214; Harkness *vs.* Burton, 39 Iowa, 101.)

**Jury.**—In a question of abandonment with reclaim after defendant had found ore, the finding of a jury of the vicinage familiar with mining usages ought to be regarded as entitled to peculiar weight. (Dillon, J., in Anderson *vs.* Simpson, 21 Iowa, 405.)

**Legal Title.**—The doctrine of abandonment only applies where there has been a mere naked possession without title. Where there is a title, to preserve it there need be no continuance of possession, and the abandonment of possession cannot affect the rights held by virtue of the title. (Ferris *vs.* Coover, 10 Cal., 589.)

**Parties.**—An abandonment by one party does not inure to the benefit of another, without appropriation on his part. (Pralus *vs.* Pacific G. & S. M'g Co., 35 Cal., 35.)

ADVERSE CLAIM.

**Summons.**—The notice required by the statute, to be given by the register of the land office, as well as by the claimant, is in effect a summons to all adverse claimants. (Wolfrey *vs.* Lebanon M'g Co., 4 Col., 112.)

**Possession.**—A complaint (or bill in equity) by claimants in possession of a mining-claim may be sustained against adverse claimants out of possession. (Houtz *vs.* Gisborn, 1 Utah, 173.)

**Subsequent acts.** — The rights of claimants of mining-ground for which application for United States patent has been made, cannot be determined by acts subsequent to the filing of the adverse claim. (Moxon *vs.* Wilkinson, 2 Mont., 421. See Sears *vs.* Taylor, 4 Col., 38, for declaration in ejectment to support adverse claim under Colorado practice act. Also see Golden Fleece Co. *vs.* Cable Consolidated Co., 12 Nevada, 312.)

**Section 254 of practice act construed.**—The words "claim or estate or interest," in section 254 of the practice act, are used in a broad sense, and are not technical in their meaning. They are evidently intended to embrace every species of adverse claim set up by a party out of possession. (Goldberg *vs.* Taylor, 2 Utah, 486.)

**Placer mines.**—A possessed ten years a lot of land in Oro Fino Gulch, and had an arastra thereon. B located in 1877 a placer mining-claim in the gulch, which included A's property, and filed his application for patent in the land-office. A filed an adverse claim to said lot. The gulch was returned as mineral land, and it had been mined to one point about one thousand feet above, and at another point about two thousand feet below the arastra. There was no testimony showing that the intermediate three thousand feet of the gulch contained any metals, and it did not appear that the channel passed through A's lot: *Held*, That A is an adverse claimant under the acts of Congress relating to placer-mining-claims, and that B is not entitled to the patent to the land in A's possession. (Shafer *vs.* Constans, 3 Montana, 369.)

ADVERSE POSSESSION.

(*See Possession*).

**Ouster — Tenants in common.**—Open, notorious, and uninterrupted possession of the whole by a tenant in common for twenty-one years, claiming the land as his own and taking the profits (by coal mining) exclusively, is evidence from which a jury may infer ouster and adverse possession. (Susquehanna Co. *vs.* Quick., 61 Pa. St., 328.)

**Sand bank.**—A valuable sand bank being exclusively and notoriously used

by the defendant, who sold the sand and used it, this being the use to which the true owner of the land would naturally apply, it meets all the requisites of a legal, adverse possession. (Ewing *vs.* Burnet, 11 Peters, 41.)

**Quarrying stone.**—Quarrying stone from time to time during a period of twenty-five years, on an uninclosed tract of fifty acres of wild land, with claim of title by deed during that time, is a complete adverse possession. (Jackson *vs.* Olitz, 8 Wend., 440.)

**Taking ore.**—When ore has been, from time to time, taken generally from the lands of a large estate, without reference to any particular tract or the subdivisions of the land, the right of the disseizor so taking the ore cannot be beyond his *pedis possessio.* (Ege *vs.* Medlar, 82 Pa. St., 86. See Aiken *vs.* Buck, 1 Wend., 467.)

**Quarrying—Statute of limitations.**—Where timber and quarry land was claimed by the owner of adjacent property, who leased the quarries for ten years, and continued afterward to procure stone and timber therefrom, or permitted others to do so, upon payment for the right, and during the time regularly paid the taxes upon the land, the claimant of the land was held to have maintained continued adverse possession. (Colvin *vs.* McCune, 39 Iowa, 502.)

AGENT.

**Lode claims located by agent.**—Any citizen who is entitled to locate a lode on the public domain may perform all necessary acts of appropriation and development through the agency of others. (Murley *vs.* Ennis, 2 Col., 300.)

**Possession of locator.**—If A locates a mining-claim in the name of B, occupies and works on it, but uses B's name, and does all acts in his (B's) name, he cannot maintain any action for the claim in his own name. The law would consider his possession the possession of B. He could only acquire an independent right in the claim by abandoning the first location and re-locating in his own name, His rights would date from second location. (Van Valkenburg *vs.* Huff, 1 & 2 Nevada, 115.)

**Agent of corporation—Power of.**—The board of directors of a corporation has no power to grant an agent thereof an irrevocable power of attorney. Such action is void. (Davis *vs.* Flagstaff S. M. Co., 2 Utah, 74.)

**Removing agent.**—The possession of the property of a corporation by its agent is the possession of the agent for his principal, and the removal of such agent and the entry into possession thereof by a new agent is not a change of possession. (Flagstaff S. M. Co. *vs.* Patrick, 2 Utah, 304.)

The general doctrines of principal and agent apply to mining-claims. See the following cases: Cumberland Coal Co. *vs.* Sherman, 30 Barb., 553; Patterson *vs.* Keystone M. Co., 30 Cal., 360; Hardenbergh *vs.* Bacon, 33 Cal., 356; Van Duzen *vs.* Star Q. M. Co., 36 Cal., 571; Norris *vs.* Taylor, 49 Ill., 18; Atlas M. Co. *vs.* Johnston, 23 Mich., 37; Palmer *vs.* Williams *et al.*, 24 Mich., 329; Adams M. Co. *vs.* Senter, 26 Mich., 73; Herbert *vs.* King, 1 Mont., 475; Simons *vs.* Vulcan Oil Co., 61 Penn. St., 202; Bell *vs.* Bell, 3 West Va., 183; Logan *vs.* Dils, 4 West Va., 397; Collins *vs.* Case, 23 Wis., 231; First National Bank *vs.* Bissell, 4 Federal Reporter, 694; Delmonico *vs.* Rondebush, 5 Federal Reporter, 165; Rogers *vs.* R. E. Lee Mg. Co., U. S., Circuit Court Colorado, Dec. 5, 1881.

AGRICULTURAL CLAIM.

**Reasonable and necessary use.**—Miners have a right to enter upon public mineral land, in the occupancy of others for agricultural purposes, and to use the land and water for the extraction of gold—the use being reasonable, necessary to the business of mining, and with just regard to the rights of the agriculturist. And this whether the land is enclosed, or taken up under the possessory act. (Clark *vs.* Duval, 15 Cal., 85.)

**Priority of possession.**—Where the title of the respective parties to public mineral lands is based on possession alone, the older possession, as between the two, gives the better right; and this although the use to which the older possessor appropriated the land was for agricultural purposes, while the younger possession was for mining purposes. (Gibson *vs.* Puchta, 33 Cal., 310. See Smith *vs.* Doe, 15 Cal., 101; Gilan *vs.* Hutchinson, 16 Cal., 154; Rogers *vs.* Soggs, 22 Cal., 444; Rupley *vs.* Welch, 23 Cal., 453; Wixon *vs.* Water Co., 24 Cal., 367.)

ALIEN.

**Location—Possession.**—Aliens cannot locate or hold mining-claims. An alien who has never declared his intention to become a citizen is not a qualified locator of mining ground and he cannot hold a mining-claim either by actual possession, or by location, against

one who connects himself with the government title, by compliance with the mining law. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nev., 312.)

**Territory cannot hold forfeited claims.**—The act of the legislature of the Territory of Montana, attempting to declare forfeited to the Territory, or to authorize proceedings to declare forfeited, mining-claims held by aliens, is in violation of the organic act, and void. (Territory *vs.* Lee, 2 Mont., 124. For review of California legislation touching foreign miners' tax, see Mitchell *vs.* Hagood, 6 Cal., 148.)

ANNUAL LABOR.

(*See Expenditure*)

APPLICATION FOR PATENT.

**Locator of mining-claim.**—Under the mining laws of the United States, the locator of a mining-claim becomes the assignee of the United States, and as long as he complies with the conditions imposed by them, and the license to occupy remains in force, the right of the locator to the possession of the land, and to appropriate to his own use the minerals therein, is full and complete; and he need not take any step to purchase the same unless he thinks proper. (Chapman *vs.* Toy Long, 4 Sawyer 28.)

ATTORNEY.

**Extortion—Land officer**—The register of the United States land-office cannot act as an attorney for an applicant for patent to mineral land; and if he receive from such applicant a gross sum in part as his official fee as charge for services as an attorney, such taking of money is extortion. (U. S. *vs.* Waitz, 3 Sawyer, 473.)

BLACK HILLS.

**Black Hills.**—No title could be acquired to mining-claims or lands in the Black Hills country until after the region was ceded by the Indians. (Ahly *vs.* Garrison, Supreme Court of Dakota, May 12, 1879.)

BOND.

**Mere option.**—A bond by the discoverer or owner of a mining-claim "in the penal sum of one thousand dollars, conditioned to convey the claim" on the payment or deposit of a given sum by a given day, is a mere option to purchase within the time specified, and may be revoked by the maker at any time before acceptance by the obligee.

**Mutuality and consideration**—Such bond, there being neither mutuality nor consideration, imposes no obligation on either party. Until acceptance by the obligee, or the performance by him, of some act equivalent to an election to purchase under the terms mentioned therein, it is *nudum pactum*.

**Specific performance** of such bond will not be enforced if the offer it contains be withdrawn before an election to purchase and tender of performance by the obligee. Otherwise, when a money consideration is expressed in the bond, or the obligee is by its terms required to improve or develop the property as a consideration for the option, and the terms have been complied with.

**Voluntary labor** performed and improvements made on the mine by the holder of such bond, pending the time stipulated in the option, though with the knowledge of the maker, do not amount to an election to purchase—especially when the bond specifies a different mode of election; but should be deemed merely for exploration for the purpose of testing value of the mine.

**An entry** upon the property, unauthorized by the writing, and without the express assent of the maker, is not such an entry as, in law, amounts to a sealing of the bond.

BOUNDARIES.

(*See Location.*)

**How defined.**—The boundaries and extent of the claim must be plainly defined by stakes or marks on the ground. (Gleeson *vs.* Martin White M. Co., 13 Nev., 442.)

**Negligence.**—When a party has the means of ascertaining a boundary line, he is guilty of negligence in not ascertaining its location. (Maye *vs.* Tappan, 23 Cal., 306.)

**Extent of claim—Declaration of president.**—It seems that in a dispute as to the extent of a mining company's claim, the declarations of the president as to the position of the boundaries, if objected to, are not admissible in evidence. (Overman S. M. Co. *vs.* American M. Co., 7. Nev., 312.)

**Whom estopped by—Agreement.**—Where two several mining companies agree upon a boundary line between the claims of the two companies, and, subsequently, other parties purchase the several interests of the two companies, with a knowledge of the boundary line so fixed, both parties are concluded by it, and are estopped from

denying the line. (Magee *vs.* Stone, 9 Cal., 600.)

**Acquiescence.**—Lessees present at a staking of a boundary line upon a reference made by lessors and the adjoining owners are bound by their presence and acquiescence. (Taylor *vs.* Parry, 1 Scott N. R., 576.)

**Marking boundaries.**—One seeking to hold a mining-claim by virtue of prior possession alone, without any reference to local mining customs, must mark out his boundaries by such distinct physical marks or monuments as will indicate to any person what his exterior boundaries are. (Hess *vs.* Winder, 30 Cal., 349.)

**Fences not required.**—Fences are not requisite around mining-claims. The physical marks upon and around the claim are sufficient to notify every one of the possession and claim of the possessor; and by common understanding, the going upon a claim to work it is an appropriation of the entire claim; especially if that claim can be appropriated to that extent by location by one man. (English *vs.* Johnson, 17 Cal., 107.)

**Fencing not necessary to possession.**—Fencing a mining-claim would serve no useful purpose except to mark its boundaries; and any other means which will accomplish that object will equally answer the requirements of the law as to the possession of such a claim. (Rogers *vs.* Cooney, 5, 6, and 7 Nev., 872.)

**Evidence.**—In an action to recover damages for a trespass upon the plaintiffs' mining-claims, where the defendants own adjoining claims lying west of the plaintiffs' ground, and both parties agree as to the north line of the plaintiffs' claims, and admit that their east and west lines are parallel, but disagree as to their location, and W. & Co. own claims adjoining and east of plaintiffs, and H. & Co. own claims adjoining and east of W. & Co. evidence of the location of the west line of H. & Co. is not pertinent, unless the east and west lines of W. & Co. are parallel, and the east line of W. & Co. is coincident with the west line of H. & Co. (Stoakes *vs.* Monroe, 36 Cal., 388.)

**Question of fact.**—What is the right boundary line of a "sett," or piece of a mine let, and whether certain premises are parcel or no parcel of the ground demised, is a question of fact for the jury; but the judge is bound to tell the jury what is the proper construction of any document necessary to be considered in the decision of that question. (Lyle *vs.* Richards, L. R., 1 H. L., 222; 35 L. J. Q. B., 214.)

CLAIM.

(*See Mining-claim.*)

CONTRACT.

**When signed by both parties.**—If a contract is drawn between the several locators of a mine and certain prospectors, to give a part of the ground for developing the mine, and signed by a part only of the locators, if the prospectors go on to work, it is at their own risk. Those not signing or consenting to the contract are not bound. (Chase *vs.* Savage S. M. Co., 2 Nev., 9; and 1 and 2 Nev., 553.)

**Failure to perform — Condition.**—If two persons agree with a third to furnish necessary supplies to the latter, as the same shall be required, for discovering and locating lodes for the joint benefit of all, the latter may treat this as a condition precedent, and upon failure to furnish the supplies he may abandon the enterprise, or he may proceed to discover and locate lodes in his own right, without regard to the contract. (Murley *vs.* Ennis, 2 Colorado, 300.)

**Title of purchaser.** — Where the owner of a mining-claim contracts, verbally, with J, for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J goes into possession thereof, and while he is working it, the owner sells it to a third party, who takes without notice of J's contract: *Held*, That his claim is not subject, or liable, to J's contract. (Jenkins *vs.* Redding, 8 Cal., 598.)

**Customs of miners.**—Where the terms of an agreement respecting joint ownership of ore-beds are doubtful, the usage of the parties in taking ore for their respective furnaces must be an important element in their construction. (Coleman *vs.* Grubb, 23 Pa. St., 393.)

**Sale—Quarry and marble works—Present capacity.**—A sale of a quarry with an agreement to keep a mill or marble works supplied with marble is made with reference to the present capacity of the mill, so that the mill cannot call for an increased supply on account of its enlargement. (Rutland M. Co. *vs.* Ripley, 10 Wall., 339.)

**Letters—Extension of time.**—Where an executory contract for sale of mines was accompanied by a covenant on the part of the purchaser to open them, and an extention of the time was alleged to be proved by certain letters, it was held that the court must determine as matter

of law the effect of such letters, and whether they referred to an extension of all the terms of the contract, or related only to an extension of time to open the mines. Second, That an extension of time in general terms would refer to all the terms of the contract. (Luckhart *vs.* Ogden, 30 Cal., 547.)

**Stockholders acting for the corporation — Option — Conditional sale.**—A contract with the owners of the stock of a mining corporation, as parties of the first part, reciting that the parties of the second part are desirous of buying the stock and mine if the tests they make prove satisfactory, and shall take possession of the mine, and make improvements on it, and that the stockholders shall assign the stock to trustees, and that the parties of the second part shall pay at a time fixed a certain sum to the trustees for the stockholders and have the stock, but forfeit their improvements and re-deliver possession if they fail to pay, accompanied by a resolution of the board of directors to convey the mine to the parties of the second part if the payment is made, merely gives the parties of the second part the option of purchasing, and by their failure to pay they lose the privilege of buying, but do not become liable for the amount they were to pay. (Gordon *vs.* Swan, 48 Cal., 564.)

**Measurement: "More or less"—Pleading**—A contract to run a tunnel (or drift) 180 feet. "more or less," is completed when 180 feet have been run. (Gerrens *vs.* Huhn & Hunt S. M. Co., 10 Nev., 137.)

Where on such a contract plaintiffs sued for 384½ feet, but did not aver that the additional feet were run at the instance of defendant, nor that the defendant had promised to pay for the same: *Held*, That the complaint did not state a cause of action. (*Id.*)

**Ultra Vires.**—A corporation is not bound by an unauthorized contract, made by its board of directors, such contract can be treated as *ultra vires*, and is not binding upon the corporation. (Flagstaff S. M. Co. *vs.* Patrick, 2 Utah, 304.)

**Contract by corporation—Directors of.**—A contract made by the directors of a corporation not authorized by the stockholders thereof, or by the charter thereof, is void. (Davis *vs.* Flagstaff S. M. Co. *et al.*, 2 Utah, 74.)

**Overdraft.**—A mining company having power under its charter to raise money, by borrowing from a bank, an overdraft by check of its authorized officers is a proper indebtedness which must be paid by a subsequent board of directors. (Mahoney Mg. Co. *vs.* Anglo-Californian Bank, (Limited,) Supreme Court of U. S., October, 1881.)

CONVEYANCE.

**California—Act relative to conveyance.**—The act of April 13, 1860, relative to the conveyance of mining-claims, applied to gold claims only until the amendment of 1863, striking out the second section, after which it applied to all mining-claims. (Patterson *vs.* Keystone Mining Company, 30 Cal., 360.)

**Evidence of title.** — The provision contained in the first section of the act of April 13, 1860, (Stats. 1860, p. 175,) that "conveyances of mining-claims may be evidenced by bills of sale, or instruments in writing under seal," is mandatory; and it was intended that the method of conveying such property therein prescribed should exclude transfers by verbal sale, even though accompanied by a delivery of possession. (Felger *vs.* Coward, 35 Cal., 650. See Melton *vs.* Lombard, 51 Cal., 258; Watts *vs.* White, 13 Cal., 321.)

**Evidence as to execution of a deed.**—A deed for a mining-claim, executed and recorded in the district where the claim is situated, before any act was passed by the Territorial Assembly, relating to such instruments, cannot be given in evidence without proof that it was executed by the grantor: 1, According to the local rules and customs of the district; or, 2, By the subscribing witnesses, (if there are any,) as provided in the 15th section of the chapter relating to conveyances. (R. S. 109; Sullivan *vs.* Hense, 2 Col., 424.)

**Corporate seal—Recital of authority.**—A deed, without the corporate seal, purporting to have been executed on behalf of a corporation by its board of trustees, is inadmissible as evidence without first showing their authority to execute the same. The recital of such authority in the deed is not evidence of its existence. (Gashwiler *vs.* Willis, 33 Cal., 11.)

**Form of bill of sale.**—No precise form of words is necessary to work a conveyance in a bill of sale for a mining-claim. If it be clear from the language of the instrument that the maker intended to pass thereby the title to the property, the law will, if possible, so construe the words used as to effectuate that intent. (Meyers *vs.* Farquharson, 46 Cal., 190.)

**Absolute grant.**—A deed after the grant of a distinct parcel in fee continued:

"also the right of digging for coal under the adjoining land lying east of said lot (describing the adjoining land,) together with all and singular the tenements, hereditaments, and appurtenances, to the said lot or parcel of ground belonging, with the right of digging for coal as aforesaid" Also a covenant of warranty of the lot, "with the right of digging for coal as aforesaid," to the grantee, his heirs and assigns "free from the claim of all persons:" *Held*, A conveyance of the absolute property in the coal. (List *vs.* Cotts, 4 W. Va., 543.)

**Parol evidence.**—Admissible for certain explanations. (Remer *vs.* Nesmith, 34 Cal., 624.)

**How construed.**—Where the language of a deed admits of but one construction, and the location of the lode or premises intended to be conveyed is clearly ascertained by a sufficient description of the ground in the deed by courses, distances, or monuments, it cannot be controlled by any different exposition derived from the acts of the parties in locating the premises, or from the failure of the grantor to designate the various names by which the ground conveyed was at different times known. (Weill *vs.* Lucerne M. Co., 11 Nevada, 201.)

**Knowledge—Questions of science.**—In cases of obscure instruments, especially on motions for a preliminary injunction, a court may inquire into the actual state of the knowledge which the parties to it had upon the subject of it, and where it involves questions of science may refer to the state of public knowledge, or that of learning, at the time the deed was made. *So held* upon the construction of an indefinite and uncertain grant, or lease, or license of the oil, or the right to take the oil upon a tract of land made at a time before the oil was known to be obtained by boring. (French *vs.* Brewer, 3 Wall. Jr., 346.)

**Blind lode—Tunnel discovery—Parol evidence.**—Where a lode known as the Gold Hill ledge had been discovered and located on the surface, and it remained in doubt whether it was the same lode which had been cut by a tunnel below, and the said tunnel was prosecuted for blind lodes, as well as for the lode discovered on surface: *Held*, That not only could the *habendum* of a deed which was uncertain as to its conveyance of the Gold Hill Ledge be used to explain or qualify the description in the granting clause, but that parol evidence was admissible to show the circumstances under which the deed was made to reach the intent of the parties as to the Gold Hill Ledge. (McCurdy *vs.* Alpha G. & S. M. Co., 3 Nev., 29.)

**Designation of the name of the claim—Two locations.**—Where a party conveys all his right, title, and interest in and to certain mining ground and quartz lode described in the deed, and it appears as a fact that his interest was derived from two different notices of location which were posted upon and claimed the same lode: *Held*, That the conveyance of his interest in the lode necessarily conveyed his interest under both locations, and it was immaterial by what particular name he designated it. (Phillpots *vs.* Blasdell, 8 Nev., 61, affirmed; Weill *vs.* Lucerne M. Co., 11 Nev., 201.)

**Possession.**—Adverse possession does not invalidate a conveyance by a party out of possession. (Roberts *vs.* Cooper, 20 How., 467.)

**Minerals pass by conveyance of land.**—Where individuals convey lands, the minerals of gold and silver pass, unless expressly reserved. (Moore *vs.* Smaw; also Fremont *vs.* Flower, 17 Cal., 199.)

**Boundary—Parol evidence—Emery—Iron ore.**—Where there was a conveyance of the metals and minerals in a certain tract "beginning at the centre of the vein of iron ore on the line between, etc.," and in trespass for taking ore there was conflicting testimony as to whether there was any such vein, or whether there was not more than one vein, and whether the parties agreed on a line of rocks as marking a supposed vein, and whether if any vein it was not a vein of emery instead of iron: *Held*, That if there was one vein of iron ore as called for in the deed, parol evidence could not affect the construction of the deed upon the question of boundary; 2, If more than one vein, parol evidence must show which was intended; 3, If it was a vein of emery or a line of rocks, it would be a good boundary under the deed, though treated by the parties as a vein of iron ore. (Chester Emery Co. *vs.* Lucas, 112 Mass., 424.)

**Title—How transferred.**—The interest of C. W. H. in said mining ground (it being conceded that it is real estate) could only pass to H. by deed or last will and testament; where, in the absence of both, C. W. H. being seized of the property, died intestate, the property descended to J. W. H. (his father.) (Hardenbergh *vs.* Bacon, 33 Cal., 356.)

**Unstamped conveyances and subsequent stamped conveyances.**—Where a party, while the acts of Congress re-

quiring conveyances to be stamped are in force, makes a conveyance without affixing a stamp thereto, and the grantee in such unstamped conveyance conveys subsequently by deed, duly stamped and in all respects valid, the grantee under the deed properly stamped takes the title unaffected by the failure to stamp the prior deed. (Kenny *vs.* Con. Va. M. Co., 4 Sawyer, 382.)

**Mistakes for and against grantors.**—If a party, in making a conveyance of one part of a mining-claim, makes a mistake against himself as to the amount conveyed, and in another part of the same conveyance makes a mistake in his favor, of a corresponding amount in another portion of the same mine, and the grantee obtains no more in the aggregate than he purchased and paid for, the equities are equal, and a court of equity will not, on application of the grantor, reform the conveyance by correcting the mistake against him, to the injury of the other party upon the entire transaction. (*Id.*)

**Actual and constructive possession.**—H and others, defendants, conveyed a mine to C, and delivered a shaft and level in the mine to plaintiffs as agent of C, retaining a certain other shaft and level in the same lode, not connected with the first, apparently claiming that part as upon another lode. C contracted to sell to plaintiffs the same mine, and gave them a bond for a deed. Afterward, by sinking and stoping, defendants took ore from the level and shaft retained by them; but the opening was not extended longitudinally. In trespass for the value of the ore so taken: *Held*, That the plaintiffs had not actual or constructive possession of the *locus in quo*, because, 1. Throughout the length of the level retained by them, the defendants had actual possession of the vein from the surface to the centre of the earth. 2. The plaintiffs' possession, whether referred to the bond from C to them, or as vendees and licensees of C, cannot be extended to the part actually occupied by defendants. 3. The circumstances that C purchased for the benefit of plaintiffs cannot be effectual in a court of law, since he held the legal title. (Hugunin *vs.* McCunniff, 2 Col., 367.)

**Partition — Security for indorsements.**—A tract of land was held by several tenants in common, and on partition a certain portion was set apart and quit-claimed to plaintiff, representing M, who had conveyed to plaintiff as security for indorsements. Another portion of the land was set apart and quit-claimed to H. The portion thus received by H was subsequently conveyed to plaintiff, and embraces the land in controversy: *Held*, That plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H to him as security for the indorsements of M, it was as trustee of the legal title; that the title had passed from H and had never been in M, except of an undivided interest before the partition, and was therefore in plaintiff, who could maintain ejectment. (Seaward *vs.* Malotte, 15 Cal., 304.)

**Conveyance without deed.**—Where by the usages and customs existing in the Territory of Utah, (now State of Nevada,) interests in mining-claims situated therein, which had been acquired by location, in accordance with the local customs and usages which then and there prevailed, could be sold and conveyed by delivery of possession without deed or other instrument in writing; and where the ancestors, from whom the plaintiff took by descent certain undivided interests in such a mine, in his lifetime, in common with the other owners so sold and conveyed said interests to a corporation formed under the laws of the State of California, by an association consisting of said ancestor and the other owners of said mine, which sale was in trust for the members of said association and their legal representatives, which conveyance was duly accepted by said corporation: *Held*, That thereby said corporation acquired the title of said ancestors to said mine, and that said trust was enforceable by plaintiffs against said corporation. (Blodgett *vs.* Potosi G. & S. Mining Co., 34 Cal., 227.)

**Contents—How proved.**—Where K acquired his interest in a mining-claim by purchase, evidenced by deed or bill of sale, he was bound for the purpose of showing title in himself, to produce the deed or bill of sale, or prove its loss, for the purpose of laying the foundation for the introduction of secondary evidence as to its contents. (King *vs.* Randlett, 33 Cal., 318.)

**Written instrument not needed, when.**—The statute of frauds, requiring an instrument in writing to create an interest in land does not apply to the taking up of mining-claims. A mere verbal authority to one man to take up a claim for another is sufficient. No title is divested out of the government, but a right of entry given under it. (Gore *vs.* McBrayer, 18 Cal., 582.)

**Title passed by possession.**—Where

the owners of a mining-claim, previously located by themselves and others, became incorporated, and placed the corporation thus formed in possession of the claim as their successor in interest, with the evident intention that whatever rights the unincorporated individuals had should pass to the corporation: *Held*, That the title to the claim passed to the corporation as effectually as it would if the transfer had been accompanied by a conveyance in writing. (Table Mountain Tunnel Co. *vs.* Stranahan, 20 Cal., 198.)

**Legal title—In whom vested.**—The legal title to the property of a mining corporation is vested in the corporation, and not in the stockholders as such. (Wright *vs.* Oroville M. Co., 40 Cal., 20.)

CUSTOM.

(*See Local Laws.*)

**Distinguished from prescription—Profit a prendre.**—A custom gives a right local to a district or community; prescription is a right attaching to the person or to a particular estate. (Perley *vs.* Langley, 7, N. H., 233. See Constable *vs.* Nicholson, 14 Scott's C. B. Reports, 230.)

Whether rights are held as a custom or as a prescription, depends upon whether they are held as a local usage or *contra* as a personal claim, or as dependent on a particular estate. (*Id.*)

All rights which may be held under a custom may be held by prescription, but the reverse of this is not true. (*Id.*)

A profit in another's land must be established as a prescription by the individual through his ancestors, or a corporation and its predecessors, or as appurtenant to some estate held by the claimant. (*Id.*)

"There are no authorities that sustain the removal of the soil, or the taking of profits from the soil of another as a custom." (*Id.*)

**Profit a prendre.**—A *profit a prendre* in another's soil cannot be claimed by custom, however ancient, uniform, and clear the exercise of that custom may have been. (Atty.-Gen. *vs.* Mathias, 4 Kay & J., 579.)

**Miners' right—How not proved.**—A custom allowing strangers to enter upon lands of another, and mine for lead, locally called "miners' right," cannot be proved by the usage of a single mine, or the usage of a few parties. (Fuhr *vs.* Dean, 26 Mo., 116.)

**Cannot divest title.**—Where a party's rights to a mining-claim are fixed by the rules of property which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. (Waring *vs.* Crow, 11 Cal., 367.)

DEED.

(*See Conveyance.*)

DESCRIPTION.

**Well-known monuments.**—The following description of a mining-claim in a bill of sale, "commencing at an oak bush near the gate of Myers' cow-yard, running straight across the river to the head of the wing-dam put in by Owens & Co. in 1868; from thence to a prominent point of granite bed-rock in El Dorado county; from this line down to the old Willow Bar line," no State mentioned: *Held*, Sufficient to allow the paper to be received in evidence, as the places mentioned might be well-known monuments easily distinguished. (Meyers *vs.* Farquharson, 46 Cal., 190. See Hancock *vs.* Watson, 18 Cal., 138.)

**Parol evidence.**—Where the description of mining-ground is differently stated in the complaint and the instrument sued on, but the descriptions are not contradictory, parol evidence is admissible to show that the two descriptions cover the same ground. (Began *vs.* O'Reilly, 32 Cal., 11.)

**Magnetic meridian—Parol evidence.** In an action concerning disputed boundary between two mining-claims, depending on an agreement between the parties, in which the word "north" was used, and parol evidence was admitted to prove that it was the custom of the locality to run boundary lines by the magnetic meridian, and that that was the understanding of the parties: *Held*, That such evidence was admissible, not to contradict or vary the term, but to ascertain the sense in which it was used. (Jenny Lind Co. *vs.* Bower & Co. 11 Cal., 194.)

**No lateral boundaries.**—In a decision upon the sufficiency of description in a tax levy, the court remarked: "We know it is a common and almost universal custom for prospectors in this State to take up claims for mining purposes on the public domain, describing them as so many feet of a certain lode, lead, ledge, or mineral vein, with all its dips, spurs, and angles, but giving no lateral boundaries to the claim." (1865.) (State *vs.* Real Del Monte G. & S. M. Co. 1 Nev., 523.)

**Ledge—How construed.**—The term, "Great Hill or Ledge of Lime Rock,"

in a deed, is to be construed, in order to ascertain its extent and limits, in the light of the circumstances attending the transaction, according to the intent of the parties, derived from the language employed by them. (Dexter Lime Rock Co. *vs.* Dexter, 6 R. I., 353.)

**Bar placer-claims.**—In a description of bar placer-claims, giving name of claim and adjoining claim, size, and location in cañon, it was held sufficient. (Grady *vs.* Early, 18 Cal., 109.)

DISCOVERY.

**Rights of discoverer.**—If it be once established or admitted that one of a company of miners was the real discoverer and entitled to a discoverer's share in the location, then such discoverer could thereafter only be shown to have divested himself of that interest by clear and positive evidence. The evidence of one witness, that the party agreed the discoverer's claim should be divided among all the shareholders in the company, when contradicted by another witness, who says he positively refused to assent to such a proposition, is not sufficient. (Smith *vs.* North American M. Co., 1 and 2 Nev., 357.)

**Effect of discovery not followed up.**—A discoverer who neglects to have his title adjudicated and registered agreeably to the ordinance, or to have his pertenencias measured and marked, does not, by such negligence, forfeit his title, but simply fails to acquire any title which could be the subject of forfeiture. (U. S. *vs.* Castillero, 2 Black; 20.)

**One wall must be found.**—Before a quartz mine can be legally located a lode must be discovered, and "before such discovery can be called a discovery, at least one well-defined wall or side of the lode must be found." (Foote *vs.* National M. Co., 2 Mont., 402.)

DISTRICT.

**Districts changed—Vested rights.**—The extent of a mining-district may be changed by those who created it, if vested rights are not thereby interfered with. (King *vs.* Edwards, 1 Mont., 235. See Golden Fleece *vs.* Cable Consolidated Co., 12 Nevada, 322.)

DISTRICT LAWS.

(*See Local Laws.*)

EXECUTION.

**Property — Liable to execution.**—The interest of a miner in his mining-claim is property, and may be taken and sold under execution. (McKeon *vs.* Bisbee, 9 Cala., 137.)

EXPENDITURE.

**Outside of claim.**—Work done outside of a mining-claim, with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it. (McGarrity *vs.* Byington, 12 Cal., 426.)

**Prospecting outside a claim.**—Work done outside a claim for the purpose of prospecting or developing it, is as available for holding the claim as if done within the boundaries of the claim itself. (Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 439.)

**Several claims worked by one system.**—The owner of several contiguous claims may form one general system adopted and intended to work them all; and when such is the case, work in furtherance of the system is work on all the claims intended to be developed by it. (*Idem.*)

**White Pine mining laws.**—Under the mining laws of White Pine district, as amended in July, 1867, it requires only two days' work to hold a "location" for a year; and such location means an entire mining-claim, irrespective of the number of locations or feet. (Leet *vs.* John Dare S. M. Co., 5, 6 & 7 Nevada, 538.)

**Trespasser — Within one year.**—Where the law requires a certain amount of labor to be performed "within one year," the locator has until the year expires to perform such labor. And a party who enters upon his claim after the other acts of location are performed, but before the expiration of such year, is a trespasser. (Atkins *vs.* Hendree, 1 Ida., 108; Chapman *vs.* Toy Long, 4 Sawyer, 35.)

**Co-tenants.**—Where a mine is possessed by tenants in common, "it is a physical impossibility to work on the interest" of one co-tenant alone. (Oro Fino Co. *vs.* Cullen, 1 Ida., 133.)

**Possession—Tunnel.**—Going on a lode to work it, or even work done in proximity having direct relation to the claim for the purpose of extracting or preparing to extract minerals from it, as for example, starting a tunnel at a considerable distance to cut the claim, would be a possession of the claim within the rules determining possession. (English *vs.* Johnson, 17 Cal., 108.)

FORFEITURE.

**Definition.**—Forfeiture means the loss of a right previously acquired, to mine a particular piece of ground by neglect or failure to comply with the rules and regulations of the bar or diggings in which the ground is situated. (St. John *vs.* Kidd, 26 Cal., 263.)

**Forfeitures deemed odious.**—Forfeitures are deemed in law odious, and must be made clearly apparent before courts will enforce them. (Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 439; Oreamuno *vs.* Uncle Sam M. Co., 1 Nev., 215.)

**Question of law.**—Mining laws, when introduced in evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture had accrued, is a question of law, and cannot, therefore, be properly submitted to a jury. (Fairbanks *vs.* Woodhouse, 6 Cal., 433.)

**Intent.**—The question of intent is not involved in forfeiture. (St. John *vs.* Kidd, 26 Cal., 263; Bell *vs.* Bed Rock Co., 36 Cal., 214.)

**Forfeiture is a legal conclusion.**—An averment of forfeiture is a legal conclusion upon which no issue can be taken. The facts should be stated so as to enable the court to determine whether a forfeiture did accrue. (Dutch Flat W. Co. *vs.* Mooney, 12 Cal., 534.)

**Effect of local rules.**—The failure of a party to comply with a mining rule or regulation cannot work a forfeiture of his title thereto, unless the rule itself so provides. (Bell *vs.* Bed Rock T. & M. Co., 36 Cal., 214.)

**Person necessary.**—In order to have a forfeiture take place, there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues. (Wiseman *vs.* McNulty, 25 Cal., 230.)

**Construction of articles of association.**—Articles of association of a mining company must be construed strictly against forfeiture. (Von Schmidt *vs.* Huntington, 1 Cal., 70.)

**Forfeiture—A failure to comply with law.**—The mining laws of the locality govern the location and manner of developing the mines, and when they directly point out how such mining-claims must be located, and how the possession once acquired is to be maintained, that course must be strictly pursued. A failure to do so might work a forfeiture of the ground. (Mallett *vs.* Uncle Sam G. & S. M. Co., 1 & 2 Nev., 157.)

**Forfeiture presumed when.**—The rules and customs of miners, that require locators to do a certain amount of work upon their claims, are conditions subsequent; and the law presumes that such locators forfeit their rights to possess and mine the same by a failure to comply therewith, although no penalty is specified in such rules and customs. (King *vs.* Edwards, 1 Montana, 235.)

**Failure to comply with local customs—Claims.**—A right to hold and work a mining-claim when acquired may be lost by a failure or neglect to comply with the rules and regulations of the miners, relative to the acquisition and tenure of claims, in force in the bar or diggings where the claim is located; and if such rules and regulations are not complied with by those holding claims in the district, the ground becomes once more open to the occupation of the next comer. (St. John *vs.* Kidd, 26 Cal., 263.)

**Diligence—Failure to comply with one law.**—In the absence of any custom or local regulation, the right of property, once attached in a mining-claim, does not depend upon mere diligence in working such claim. The failure to comply with *any one* mining regulation is not a forfeiture of title. It would be enough to hold the forfeiture as the result of a non-compliance with *such* of them as make non-compliance a cause of forfeiture. (McGarrity *vs.* Byington, 12 Cal., 426.)

**Non-payment of assessments.**—Where a forfeiture of an interest in a mining-claim for non-payment of assessments is claimed under an agreement entered into by all the tenants in common owning the same, the parties claiming the benefit of the forfeiture must show an exact compliance on their part with all conditions in the agreement, or they will not be entitled to the forfeiture. (Wiseman *vs.* McNulty, 25 Cal., 230.)

HOISTING-WORKS.

**Trespass—Identical soil.**—The fact that hoisting-works are erected by a trespasser over a vein of ore, and for the purpose of hoisting that ore, does not give the owner of the vein any right to those works unless he also is owner or is entitled to the possession of the very soil on which they are erected. (Bullion Mg. Co. *vs.* Crœsus G. & S. M. Co., 2 Nevada, 180.)

INJUNCTION.

**Preservation of property.**—When the title to a mining-claim is in controversy, an injunction may be granted to preserve the property pending the litigation.

(Hess *vs.* Winder, 34 Cal., 270. See Morrison's Mining Digest for further references.)

JURISDICTION.

**Act of Congress—Jurisdiction of State courts.**—The object of the acts of Congress of July 26, 1866, July 9, 1870, and May 10, 1872, in relation to the location of mining-claims, was not to confer any additional jurisdiction upon the State courts, but to require parties protesting against the issuance of a patent to try the right of possession and have the controversy determined in the State courts by the same rules, and governed by the same principles, and controlled by the same statutes, that apply in other cases. (The 420 M. Co. *vs.* Bullion M. Co., 9 Nev., 240.)

**Jurisdiction.**—Where the only questions to be litigated in suits to determine the right to mining-claims are, as to what are the local laws, rules, regulations, and customs by which the rights of the parties are governed, and whether the parties have, in fact, conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases, under the provisions of the act giving jurisdiction in suits "arising under the Constitution and laws of the United States." (Trafton *vs.* Nougues, 4 Sawyer, 178.)

LABOR.

(*See Expenditure.*)

LEASE.

**Fraudulent lease of a mine.**—Where a board of directors of a mining corporation makes a nominal lease of the mine owned by the corporation, to a party really acting in the interests of a minority of the stockholders, not in the ordinary course of the business of the corporation, but for the purpose of withdrawing the mine from the control of a board of directors about to be elected at an approaching meeting of the stockholders, and thereby perpetuating the control of the minority, a court of equity will cancel the lease on a bill filed by the corporation for that purpose. (Mahoney M. Co. *vs.* Bennett, 5 Sawyer, 141.)

**Royalty—Option.**—A lease of mining lands provided that the lessee should mine all the ore and at least a certain amount per year, and should pay a royalty for each ton mined. It also provided that when the veins of ore were less than fifteen inches thick it was to be at the option of the lessee whether to mine or not. In an action for royalties: *Held*, That the lessee, not having used the option, but still remaining in the possession and use of the land, is liable unless the land has been exhausted of ore. (Gilmore *vs.* Ontario Iron Co., N. Y. Court of Appeals; Decided Oct. 25, 1881.)

LIENS.

**Foreman of mine entitled to lien.**—Where a foreman of a mine is employed to "boss" the men at work in a mine, keep their time and give them orders for their pay: *Held*, That his employment is of that kind that is protected by the lien law. (Capron *vs.* Strout, 11 Nevada, 304.)

**Laborers' lien.**—The act of February 6, 1867, allowing liens in favor of laborers for work done on mining-claims, (Statutes of 1867–68,) did not give a lien for labor done before its passage. (Hunter *vs.* Savage Con. S. M. Co., 3 and 4 Nevada, 647; 4 Nevada, 153.)

**Mechanics' lien for work done by miner under various contracts.**—Where miners filed mechanics' liens for work done in the development of a mine, and it appeared that they worked a portion of the time under special contracts, and a portion of the time by the day, but always under the direction of the foreman of the mine: *Held*, That the work was to be considered as one continuous employment, and not as distinct and independent jobs or contracts, and that each miner might file one lien for all his labor within the proper time after stopping work. (Skyrme *vs.* Occidental Mill and M. Co., 8 Nevada, 219.)

**Character of the work or materials furnished.**—A lien may be had for powder, steel, and candles furnished for the use of the mine; and so for furnishing materials for, and building, a house or shop contiguous to the mine, and built for the use of the mine under the directions of the mining superintendent, such house being owned by the owners of the mine, and being a part of the mining property.

**Attach—From what time.**—The lien attaches not from the date of the filing of the "statement" required by the lien law, but from the date of the commencement of the labor or furnishing of the first materials. (Keystone Mining Co. *et als. vs.* Gallagher *et als.*, 4 Colorado Supplement, 62.)

LOCAL LAWS.

**Reserved rights—Miners' customs.**—The clause in section 1 of the general mining act of July 26, 1866, "subject to such regulations as may be prescribed by law," is a reservation of the right by

Congress to regulate by legal enactments the manner and conditions under which claims must be worked by miners. The clause in the same section, "subject also to the local customs or rules of miners in the several mining-districts," relates to the rules, customs, and regulations of miners regarding the location, user, and forfeiture of mining-claims. (Robertson *vs.* Smith, 1 Montana, 410.)

**United States Courts.**—Where the only questions to be litigated in suits to determine the rights to mining-claims are as to what are the local laws, rules, regulations, and customs by which the rights of the parties are governed, and whether the parties have in fact conformed to such local laws and customs, the courts of the United States have no jurisdiction of the cases under the provisions of the act giving jurisdiction in suits "arising under the Constitution and laws of the United States." (Trafton *vs.* Nougues, 4 Saw., 178.)

**Mining on the public lands legalized —Rights of miners.**—Section 9 of the act of July 26, 1866, grants to the proper persons an easement upon the mineral lands of the public domain, which they may appropriate according to the local rules and customs of miners in the mining-district in which the same may be situated, and thereby legalizes the mining upon the public lands of the United States for the precious metals. (*Id.*)

**Nevada statutes—Judicial recognition.**—The mining regulations once established and recognized by the courts, and in Nevada by statute, have the force of legislative enactments. (Mallett *vs.* Uncle Sam M. Co., 1 Nev., 194.)

**Judicial notice.**—Judicial notice cannot be taken of the rules, usages, and customs of mining-districts, and they should be proved at the trial, like any other fact, by the best evidence that can be obtained respecting them. (Sullivan *vs.* Hense, 2 Col., 424.)

**Nevada, statute of limitations of.**—The statute of limitations of Nevada, as construed by the supreme court of the State, excepts from its protection a foreign corporation. (Union Cons. Min'g Co. *vs.* Taylor, 10 Otto, 37.)

**District rules.**—The mining laws of the United States recognize and sanction the custom among the miners of organized mining-districts to adopt local laws or rules governing the location, recording and working of claims not in conflict with the State or Federal legislation. (Golden Fleece *vs.* Cable Cons. M. Co., 12 Nevada, 312.)

**Common law.**—The rules and customs of miners in a particular district are laws, and constitute the American common law on mining for precious metals. (King *vs.* Edwards, 1 Montana, 235.)

**Conditions.**—The rules and customs, which point out the manner of locating mining ground, are conditions precedent, which must be substantially complied with. (*Idem.*)

**Power.**—Miners have the power to prescribe the rules governing the acquisition and divestiture of titles to this class of claims, and their extent, subject only to the general laws of the State. (English *vs.* Johnson, 17 Cal., 107.)

**Right of possession.**—In order to secure the right of possession to a mining-claim, there must be a compliance, not only with the laws of the United States, but also with such local regulations of the mining-district as are not in conflict therewith. (Gleeson *vs.* Martin White Mg. Co., 18 Nevada, 442.)

**Vested rights.**—The right in a mining-claim vests by the taking in accordance with local rules. (McGarrity *vs.* Byington, 12 Cal., 426.)

**Right, how maintained.**—To enable a party to maintain a right to a mining-claim after the right is acquired, it is necessary that the party continue substantially to comply with the mining rules and customs established and in force in the district where the claim is situated. (Oreamuno *vs.* Uncle Sam G. & S. M. Co., 1 Nevada, 215; Strang *vs.* Ryan, 46 Cal., 38; Doak *vs.* Brubaker, 1 Nev., 217.)

**Vested rights.**—The right to occupy, explore, and extract the precious minerals in the mineral lands of the United States becomes vested in the party who locates these lands according to the local rules and customs of the mining-district in which they are situated. (Robertson *vs.* Smith, 1 Montana, 410.)

**Observed "mining customs" prevail over disregarded "district mining laws."**—Section six hundred and twenty-one of the Practice Act makes no distinction between the effect of a "custom" or "usage," the proof of which must rest in parol and a "regulation" which may be adopted at a miners' meeting and embodied in a written local law; and a custom, reasonable in itself and generally observed, will prevail as against a written mining law fallen into disuse. (Harvey *vs.* Ryan, 42 Cal., 626.)

**Existence of "district mining laws" —A question of fact.**—As the "mining law" of a district must not only be established, but in force, it is void when-

ever it falls into disuse or is generally disregarded, and the question whether it is in force at a given time is one of fact for the jury. (*Idem.* See Coleman *vs.* Clements, 23 Cal., 245.)

**Presumption.**—It will be presumed, in the absence of evidence, that the parties in the possession of mining-claims hold them according to the local rules and customs of the miners in the district. (Robertson *vs.* Smith, 1 Montana, 410.)

**Mining laws presumed to be in force.**—It is presumed that the written laws of a mining-district are in force, and any custom that conflicts with them must be clearly proven. (King *vs.* Edwards, 1 Montana, 235.)

**Mining rules as evidence.**—In suit for mining-claims the court permitted defendants to introduce in evidence the mining rules of the district, though adopted after the rights of plaintiffs had attached: *Held*, That, admitting plaintiffs' rights could not be affected by such rules, still, as defendants claimed under them, they were competent evidence to determine the nature and extent of defendants' claim, the effect of such rules upon the pre-existing rights being sufficiently guarded by instructions of the court. (Roach *vs.* Gray, 16 Cal., 388.)

**Local rule.**—A local mining regulation or custom adopted after the location of a claim cannot be given in evidence to limit the extent of a claim previously located. (Table Mountain Tunnel Co. *vs.* Stranahan, 31 Cal., 387.)

**Introduction of testimony.**—Testimony as to mining customs may be introduced under our statute, however recent the date or short the duration of their establishment. (Smith *vs.* North American M. Co., 1 Nevada, 424.)

**Controversies solved by mining usages and customs.**—Where any local mining customs exist, controversies affecting a mining right must be solved and determined by the customs and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs and usages are written or unwritten. (Morton *vs.* Solambo C. M. Co., 26 Cal., 527.)

**Change in written mining regulations.**—An alteration, made after their adoption, in one of several mining regulations reduced to writing by the officers of the meeting, does not change the legal effect of the other articles. (Table Mountain Tunnel Co. *vs.* Stranahan, 31 Cal., 387.)

**Limitation of purchase.**—The mining rules of the district cannot limit the quantity of ground or the number of claims a party may acquire by purchase. (Prosser *vs.* Parks, 18 Cal., 47.)

**Rules of a district not varied by those of another.**—The rules and customs of the miners of one district cannot be introduced to vary those of another district. (King *vs.* Edwards, 1 Montana, 235.)

**Evidence of local mining laws.**—In order to introduce evidence of the local mining laws of districts it is necessary that it should be made to appear *aliunde* that the copy offered comes from the proper custodian, and that such person was empowered to give certified copies thereof, so as to become evidence, and that such was a copy of the laws in force in such district. (Roberts *vs.* Wilson, 1 Utah, 292.)

**Book of mining rules as evidence.**—In this case, *Held*, That defendant could not offer in evidence an extract or single clause of a book containing the mining rules; but must offer the whole book, the book being in court and in possession of defendant, and it being necessary to a fair understanding of any one part that the whole should be inspected. (English *vs.* Johnson, 17 Cal., 107.)

**Proof of mining customs.**—On the trial of an action to quiet the title to a mining-claim, the plaintiffs' title depended upon maintaining their allegation, that by the custom prevailing among miners of the district embracing their claims the mode of locating claims therein was for the locators to measure off and designate by stakes on the ground their boundaries, to enter upon the occupation of the same, and to cause a record thereof to be made of such location, in the county recorder's office: *Held*, That the contents of a book kept in said recorder's office, consisting of the records of numbers of such locations—among which, and the first in the order of their registration, was the record of plaintiffs' claim—was properly admitted in evidence as tending to prove such allegation. (Pralus *vs.* Pacific G. & S. Mining Co., 35 Cal., 30.)

**Excess over quantity allowed by mining laws.**—In the absence of any mining rule declaring that a failure to record a claim avoids the entry or claim, a party may take actual possession of mineral land, though in taking possession he do not observe the requirements as to registry and the like acts prescribed by the local laws. But if he take more land than these rules allow this would not give him title to the excess against any

one subsequently entering who complies with the laws and takes up such excess in accordance with them. (English *vs.* Johnson, 17 Cal., 107.)

**Laws passed on a different day from that advertised.**—The fact that mining laws and regulations were passed on a different day from that advertised for a meeting of miners does not invalidate them. Courts will not inquire into the regularity of the modes in which these local legislatures or primary assemblages act. They must be the judges of their own proceedings. It is sufficient that the miners agree—whether in public meeting or after due notice—upon their local laws, and that these are recognized as the rules of the vicinage, unless fraud be shown, or other like cause for rejecting the laws. (Gore *vs.* McBrayer, 18 Cal., 582.)

**Nevada county, California.**—The true interpretation of the mining usage in the county of Nevada is, that work to the value of one hundred dollars, or twenty days of faithful labor performed on a claim, or on any one of a set of adjoining and contiguous claims, owned by the same party, is sufficient to hold the same for one year. (Bradley *vs.* Lee, 38 Cal., 362.)

**Manner of locating and conveying Colorado claims.**—Before any law was enacted by the Territorial assembly, regulating the manner of locating and conveying mining-claims on the public domain, that matter was regulated solely by rules or by-laws made by the inhabitants of the district in which the claim was situated, or in the absence of such rules and by-laws, by the local customs and usages of the district. (Sullivan *vs.* Hense, 2 Col., 424.)

LOCATION.

**Statutes construed.**—Section 3 of the mining act of May 10, 1872, recognizes as valid locations of mining-claims made prior to its passage, and while the mining act of 1866 was in force, the surface lines of which included more than one vein or lode, and confirms the locators thereof in the exclusive possession of all the lodes which have their apex within the surface lines of such mining-claim. (Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 439.)

**Reasonable time to sink a discovery-shaft.**—The question of reasonable time is a matter of fact to be determined by the court when the facts are not controverted. That the court should have itself decided that the period occupied in sinking said shaft was not a reasonable time, and their having left the question to the jury under an instruction by which the jury were not absolutely precluded from finding that eighty-five days (the time actually occupied) was a reasonable time, it was a matter of mere grace, of which the locator could not complain. (Patterson *vs.* Hitchcock, 3 Colorado, 533.)

**Sufficient marking of boundary lines.**—When stakes and stone monuments were put at each corner of the claim and at the centre of each of the end lines: *Held*, To be a sufficient marking of the boundaries. (Southern Cross G. & S. M. Co. *vs.* Europa M. Co., 15 Nev., 383.)

**Record of claim when not necessary.**—A record is not, under the laws of Congress, essential to the validity of a mining-claim, unless made obligatory by local regulations. (*Ibid.*)

**Notice of location.**—A notice of location which called for stone monuments at each corner of the claim, and described it as being bounded by four other well-known claims: *Held*, Sufficiently definite as to the locus of a claim. (*Ibid.*)

**Assays of rock taken after location of claim.—Competent evidence to prove existence of mineral vein.**—Assays of rock which were taken from a mining-claim long after the date of its location are competent evidence as tending to show that the locators had discovered a vein at the time of the location. (*Ibid.*, 384.)

**Certificate of location—Recording—Colorado Rev. St. 629.**—An act of the assembly of the State of Colorado (Rev. St., 629.) requires that the certificate of the location of a mining-claim must be filed of record in the office of the recorder of the county in which the claim may be, within three months next after the discovery of the ledge: *Held*, That failure to record the certificate within the prescribed time would not render the same invalid, provided all things had been done as the act required, before any other and better right to the same ground had been perfected. (Faxon *vs.* Barnard, 4 Federal Reporter, 702.)

**Location—Priority.**—Therefore, when the Ontario lode was discovered on the public land, February 11, 1878, and the location completed in July of the same year, and the Green Mountain lode was discovered in August, 1877, and the location completed by filing for record a certificate of location in March, 1878, and these two locations partly overlapped each other; it was *Held*, That the claim of the Green Mountain lode would prevail over the Ontario lode upon the ques-

tion of priority of discovery and location. (*Ibid.*)

**Description—Rev. Stat. § 2324—Colorado Rev. Stat. 630.**—Section 2324 of the Revised Statutes requires the description of a mining-claim to refer to some natural object or permanent monument from which the claim may be identified, and the Revised Statutes of Colorado (630) declare that the certificate of location shall give "such description as shall identify the claim with reasonable certainity:" *Held*, Under these statutory provisions, that a certificate which described a claim as "situated on the north side of Iowa gulch, about timber line, on the west side of Bald Mountain * * staked and marked as the law directs," was void for uncertainty of description. (*Ibid.*)

**Location—Possession.**—A location cannot be extended over a senior discovery in the actual possession of another. (*Ibid.*)

**Presumption — Injunction.**—It will be presumed, upon a preliminary motion for an injunction, that such possession continued at the time of a junior location, in the absence of proof to the contrary. (*Ibid.*)

**Mining rules and regulations—Conflict of evidence—Abandonment.**—In an action of ejectment for a mining-claim in which the verdict and judgment was for the defendants, the evidence was conflicting as to whether the plaintiff's claim had been staked off and surrounded by a ditch as required by the mining rules and regulations of the district, and also as to whether the claim had been abandoned, there being, on the latter point, evidence tending to show abandonment, and the plaintiff's own testimony that he had not intended to abandon; *Held*, Upon the first point, that compliance with the mining rules, in the particulars specified, was essential to the validity of the claim, and upon the second, that the evidence of the plaintiff as to his intentions was not conclusive, but the intention was to be determined from all the facts and circumstances of the case; and the evidence being conflicting on both points, that the verdict should not be disturbed. (Myers *vs.* Spooner, 55 Cal., 257.)

**Location and re-location — The boundaries cannot be so changed as to interfere with intervening claimants.**—One who has located a mining-claim, had it surveyed, and the certificate recorded, cannot, by a re-location, change the courses and distances so as to interfere with intervening claimants. One of the objects of the law requiring the certificate to be placed on record, is to notify others of the boundary claimed, that they may make locations if they wish of grounds not embraced in the boundary. (Pollard *vs.* Shively *et al*, Supreme Court of Colorado, December 7, 1880.)

**Certificate of location—Monuments and field-notes—Which control.**—A recorded certificate of location is a statutory writing affecting realty—being in part the basis of the miner's right of exclusive possession and enjoyment of his mining location granted by act of Congress—its purpose being, by the description it contains, to "identify the claim with reasonable certainty"—as in patents, grants, and other conveyances of real estate. The monuments required to be set up to mark the boundaries of the claim, serve the same purpose. Monuments, generally, being more obvious and certain, control that which is less so; hence it is the rule that the courses and distances of a survey must yield to its monuments. But in the absence of the monuments, as described in the certificate and required by law, the courses and distances as contained in the certificate will control the survey. (*Ibid.*)

**Parol testimony cannot be allowed to contradict the record.**—Where there is a variance between the monument called for in the certificate, and that actually found upon the ground, the courses and distances contained in the certificate must prevail; and parol evidence will not be allowed to contradict the record and show that the statements of the certificate are incorrect—as that what the certificate denominates a "stake" was in fact a "stump." Parol evidence is only admissible in case of ambiguity in the record; but when the intent is clearly expressed no evidence of extraneous facts or circumstances can be received to alter it. Otherwise the boundary would depend, not upon the record, but upon the memory of witnesses. (*Ibid.*)

**Corner posts—The locator should keep them in position as notice to others.** — There is no reason why a "stump," standing in the corner place, may not be adopted as a corner "post;" but in such case the certificate should give the fact. Prior to patent, the locator should keep his monuments in position to an extent that gives fair and reasonable notice to others who may de-

sire to locate contiguous ground; and a claimant who has not kept up his boundary posts will not be permitted to show the courses and distances of his recorded location to be erroneous, when the rights of an intervening locator, without notice, will be prejudiced. Otherwise there would be no protection against "swinging locations"—an evil against which the strict requirements of the statute were intended to protect. (*Ibid.*)

**Side-line posts.**—Posts placed opposite the "discovery-shaft," six hundred feet from one end and nine hundred feet from the other end of the claim, is a substantial compliance with the requirements of the statute that the side posts be placed in the centre of the claim—as with the corner posts properly located, the boundaries of the claim, with side posts so placed, can be "readily traced" by them. (*Ibid.*)

**Instructions.**—In an action for unlawful entry, (under § 1160, Code Civ. Proc.,) it appeared that the defendants entered upon the mining-claim of the plaintiff, under the claim that the plaintiff's location was void, and with the purpose of themselves locating it; and the court instructed the jury that if the defendants entered peaceably and in good faith, under claim or color of title, or in good faith, believing themselves to be the true owners, they were entitled to a verdict; but that a party cannot enter for the purpose of obtaining title or color of right, but must have it before he entered; and refused to instruct the jury, at the instance of the defendant, that if the defendants entered upon the mines peaceably and in good faith, believing that they were open to location, then the entry was not unlawful: *Held*, That there was no error. (Phœnix M'g Co. *vs.* Lawrence, 55 Cal., 143.)

**Evidence—General belief.** — The court properly ruled out the following question: "Do you know what the *general belief* was with reference to those mines, as to whether they were abandoned or not?" (*Ibid.*)

**Location of quartz lodes.**—The Russell lode was located prior to May 10, 1872, and the record title was in A a number of years before July 21, 1877. A performed work eighteen days on the property between December 7, 1875, and December 17, 1875, and did no more work thereon until July 19, 1877. B located this lode by posting his notice of location on a stake at the discovery-shaft of the Russell lode. A entered upon the lode July 19, 1877, and worked about one hour, when B run the lines of the Empire lode, and cut and placed thereon four corner stakes. The notice of B's location was recorded July 20, 1877: *Held*, That the act of B, in placing the notice on said stake, did not constitute a location of the lode under the laws of the United States. (Gonu *vs.* Russell, 3 Mont., 358.)

**Forfeiture.**—A had a right to resume work on the Russell lode at said time and thereby defeat a forfeiture of his title. (*Ibid.*)

**Resumption of work.**—The acts of B, after the resumption of work by A, did not impair A's rights to the Russell lode. (*Ibid.*)

**Record—Location—Mistake.**—It appeared on the trial that a district recorder, in recording the notice of one of the defendant's claims, omitted by mistake one of the lines, but, in fact, the lines were distinctly marked on the ground, as required by the mining rules: *Held*, That the defendants were not bound by the mistake of the recorder, and that the actual location on the ground was sufficient to impart notice to all comers. (Myers *vs.* Spooner, 55 Cal., 257.)

**Ledge—Location—Patent.**—Prior to May 10, 1872, a locator upon mining ground was entitled to one ledge only, and could not have obtained a patent from the United States for more. Under the act of Congress of May 10, 1872, a patentee is entitled to all the ledges having their apexes within the surface lines of the land granted, but such act does not affect rights acquired prior to its passage—it is prospective. (Eclipse G. & S. M'g Co. *vs.* Spring, Cal. S. C., Dec. 2, 1881, P. C. L. J., p. 698)

**Top or apex.**—The top or apex of a vein is the highest point where it approaches nearest to the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein. If a vein at its highest point turns over and pursues its course downwards, then such point is merely a swell in the mineral matter, and not a true apex. (Stevenson *vs.* Williams, 1 McCrary, Colorado Circuit, p. 480.)

**Following vein.**—Where there is a true apex within the surface boundaries of a claim the claimant can follow the claim in its downward dip beyond his vertical side-lines, and he may follow the vein beyond such side-lines at any point where the apex is within his surface-lines, even though his location for the

full length of the claim be not along the line of such apex; and he is entitled to follow the same in its departure from the perpendicular, in any degree, until it reaches the horizontal. (*Ibid.*)

**Locations—How made.**—Under the laws of Congress the location of a mining-claim, or a vein, must be made by taking up "a piece of land" to include the vein. (Gleeson *vs.* Martin White M. Co., 13 Nev., 442.)

**Colorado mining-claims located in 1860.**—In the year 1860 a valid location of a mining-claim on the public domain could be made only according to the rules, usages, and customs of miners in the district where such claim is situated. (Sullivan *vs.* Hense, 2 Col., 424.)

**Sufficiency of notice and of location.**—A notice of location, otherwise good, is not invalid because it does not contain a description of the claim by reference to some natural object or permanent monument; the law only requires that the record of the claim shall contain such desciption. It is a sufficient compliance with the law if the description of the *locus* of the claim is appended to the notice when it is recorded. (Gleeson *vs.* Martin White M. Co. 13 Nev., 442.)

**General recognition makes a title good.**—Where a mining-claim is made and actually possessed and worked for several years, the claim and location being generally recognized as valid by the miners of the vicinity, the title of the claimant is good, even though the location may not have been originally made in strict accordance with the mining rules in force at the time, especially so as between the co-claimants and their grantees. (Kinney *vs.* Con. Va. M. Co., 4 Sawyer, 382.)

**Mineral districts—Locations for diverse purposes.**—One party may locate ground in the mineral districts for fluming purposes, and another party, at the same or a different time, may locate the same ground for mining purposes, the two locations being for different purposes will not conflict. (O'Keife *vs.* Cunningham, 9 Cal., 589.)

**Statement of witnesses.**—Where the location of a mining-claim is made both by posting notices and by designating fixed objects, such as trees, shafts, and ditches, on or near its exterior boundaries, in an action between two companies involving the title to a portion of the ground, witnesses are not confined in their testimony to a statement of the contents of the notices, but may also state whether the location made included the ground in dispute. (Kelly *vs.* Taylor, 23 Cal., 11.)

**Location presumed to include.**—A location of a lode-claim will be presumed to include the vein upon which the discovery was made until the contrary is shown. (Patterson *vs.* Hitchcock, 8 Col., 533.) But when the vein has been shown to leave the side lines of the location, the location beyond the point of departure is defeasible if not void. (*Ibid.*)

**Excess void—Stakes mis-set.**—A claim of more than the number of feet allowed by law upon a quartz-claim is void for the excess; but setting the stakes a few feet farther apart than the limit allowed by law does not defeat the entire claim. (Atkins *vs.* Hendree, 1 Idaho, 108.)

**Patent broader than the law.**—A lode-claim is to be fixed by reference to the plat or survey of the location; and although the lode, in its descending course, may be followed to any depth with its dips, angles, and variations, into the premises adjoining, yet in its onward course or strike it may not depart from the line of its location, and the patentee is not entitled to its possession beyond the lateral boundaries, as against one who has subsequently located and patented it. If the patent is broader than the law, it is to that extent nugatory. (Wolfley *vs.* Lebanon M'g Co., 4 Cal., 112.)

**Quantity of ground.**—The quantity of ground a miner can claim by location or prior appropriation for mining puposes may be limited by the mining rules of the district. (Prosser *vs.* Parks, 18 Cal., 47.)

**Reasonableness of the extent of a location.**—Upon the question of reasonableness of the extent of a mining location, a general custom, whether existing anterior to the location or not, may be given in evidence; but a local rule stands upon a different footing, and cannot be introduced to affect the validity of a claim acquired previous to its establishment. (Table Mountain Tunnel Co. *vs.* Stranahan, 20 Cal., 198.)

**Reasonableness of size of claim.**—If the defendants in an action claim that when they took up the ground in dispute a local custom allowed them three hundred feet front to each man, and they located to that extent, they are estopped from asserting that the plaintiff's location to the same amount, made before the adoption of the custom, was unreasonable in size. (*Id.*)

**Declarations admissible.**—Plaintiff

located a quartz lode and commenced work, digging up the rock towards the lode, at a distance of fifty or one hundred feet from it: *Held*, That his declarations made at the time, as to his object in commencing work at that point, were admissible in evidence. (Draper *vs.* Douglass, 23 Cal., 347.)

**Renewal of location.**—If the mining laws require a renewal of notice of location at stated periods, and a claim has been lost by reason of a failure to make such renewals, and one of the joint locators afterward renews the location, stating that it is a renewal, and not a new location, the renewal will inure to the benefit of all the locators. (Strang *vs.* Ryan, 46 Cal., 33.)

**Reasonable time.**—Upon discovering a lode, the locator is entitled to a reasonable length of time in which to perfect the development which the local law requires of him. (Murley *vs.* Ennis, 2 Col., 300.)

**Notice of location construed.**—Where a notice reads that the locators have taken, and claim, for "mining purposes, 1,200 feet of ground on the face of this hill * * * running north 1,200 feet from stake, with all its dips, angles, and spurs, from thence to the centre of the hill:" *Held*, That the words, "with all its dips, angles, and spurs," refer to lode, not to surface or hill claims. (Weill *vs.* Lucerne M. Co., 11 Nev. 200.)

**Record or office copy of certificate of location.**—A certificate of location of a mining-claim may be proved by the record or by a transcript from the record under another statute, (R. S. 466,) without the affidavit of the party desiring to use it as to the possession of the original certificate. (Sullivan *vs.* Hense, 2 Col., 424.)

**Mining law construed.**—The language of a mining law being that "the locator of a ledge shall be entitled to hold one hundred feet on each side of his ledge:" *Held*, That by virtue of location of a certain number of feet along the ledge, without any distinct claim of side ground, the locator was entitled to hold one hundred feet on each side of the ledge so located. (Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 439.)

**Claiming all the privileges granted by the law.**—Where a locator, in his notice of location, claimed "all the privileges granted by the laws" of the mining-districts: *Held*, That this was a sufficient claim for the one hundred feet on each side of his ledge granted to a locator by the mining law, admitting such claim to be necessary. (*Id.*)

**Plaintiffs in ejectment.**—Plaintiffs in ejectment, who seek to recover a mining-claim upon the strength of their paper title, there being nothing to show that they or their grantors were ever in possession, must prove a valid location of the claim according to the rules, usages, and customs of the district prevailing at the time such location was made. (Sullivan *vs.* Hense, 2 Col., 424.)

**Ineffectual location.**—The placing of a monument in the centre of a mining-claim upon a mineral vein, and posting a notice thereon, stating that the "undersigned claims seven hundred and fifty feet easterly and seven hundred and fifty feet westerly therefrom, together with three hundred feet on each side of the vein, with all the dips, spurs, and angles," giving the name of the lode and district, is not a sufficient compliance with the act of Congress of May 10, 1872, which requires locators of mining-claims to distinctly mark their locations on the ground, so that the boundaries can be readily traced. (Gelcich *vs.* Mariarity, 53 Cal., 217.)

**Declaration of superintendents.**—After a vested right to a mining company's claim has been acquired by a compliance with the laws, it is not held by so precarious tenure as that it can be reduced by mere declarations of superintendents and officers. (Overman S. M. Co. *vs.* American M. Co., 7 Nev., 312.)

**Insufficient location.**—The posting of a notice upon a tree at each end of a mining-claim is not a sufficient compliance with section 2324 of the Revised Statutes of the United States, which requires the location to be "distinctly marked on the ground so that its boundaries can be readily traced." (Holland *vs.* M. A. G. Q. M. Co. 53 Cal., 149.)

**Width of lead—Point of measurement.**—The proper construction of the act of the Montana legislature, of December 26, 1864, contained in the Codified Statutes, (522, § 3,) is that the measurement of the *fifty* feet on either side of the *lead*, allowed for working purposes, should begin from the outer walls of the *lead*, on each side, and not from the centre of the *lead* itself. (Foote *vs.* National Mining Co. 2 Montana, 402.)

**Meaning of "location" in White Pine mining laws.**—The word "location," as used in the mining laws of the White Pine district, means the aggregate of ground claimed as a mine, and not the interest of a single shareholder. (Leet *vs.* John Dare S. M. Co., 5, 6, and 7 Nevada, 538.)

**Absence of mining laws—Presump-**

tion.—In the absence of mining regulations, the fact that a party has located a claim bounded by another, raises no implication that the last-located claim corresponds in size, or in the direction of its lines, with the former. (Live Yankee Co. *vs.* Oregon Co., 7 Cal., 41.)

**Rights of co-locators.**—There being no evidence tending to show that Leonard's co-locators were aware of his disability, or were colluding with him in his attempted fraud, if he was an alien: *Held*, That in such a case the law would be sufficiently vindicated by holding that the alien's claim is void. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nev., 312.)

**Vein and lode defined.**—While metalliferous rock in place, not in a fissure, may be found under such conditions within clearly defined boundaries, as to require recognition as a vein or lode, as in the Eureka case, (4 Sawyer 302,) a broad metalliferous zone, having within its limits true fissure veins, plainly bounded, cannot be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced. (Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 429.)

**Act of Congress—What it gives.**—The object of the act of 1872 was to give to the discoverer his lode with surface-ground adjacent to and within a certain distance on either side of that lode, and, to avoid questions of vein identity, to give him in addition all other veins within his surface location; but that if the vein originally discovered was not followed by a survey which included such vein, the surface-ground allowed to the discovery vein and the side veins additionally granted could not be construed to include the surface and the side veins within a lot of ground which did not contain the original vein first discovered. (Patterson *vs.* Hitchcock, 3 Col., 533.)

**When surface lines cannot be changed.**—Under the mining laws of the United States, unaided by any supplementary miners' rules, there is no way of locating a quartz vein, except by marking out surface lines, and when these lines have been marked they cannot be changed so as to take in ground that has been located by others prior to such attempted change. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nevada, 312.)

**Quartz—Loose and solid.**—The first locator of a quartz lode is not confined simply to the solid quartz actually embodied in the bed rock, but is entitled to the loose quartz rock and decomposed material, which were once a part of the lode, and are now detached, so far as the general formation of the ledge can be traced. (Brown *vs.* '49 and '56 Quartz Mining Company, 15 Cal., 152.)

**Departure from side lines.**—If a lode in its onward strike departs from the side lines of the patented location, the plaintiff in ejectment is not entitled to recover. (Johnson *vs.* Buell, 4 Colorado, 557.)

**Followed to any depth—Adjoining lands.**—Section two of the act of Congress of July 26, 1866, clearly permits the patentee of a lode mining-claim to follow the lode in its descending course to any *depth*, although in its downward trend it is carried by dips, angles, and variations into the adjoining land. (Wolfley *vs.* Lebanon Mining Co., 4 Col., 112.)

**Judgment — Surface and lode.**—When a miner locates a portion of the surface, and also a lode or ledge following its dips, angles, and spurs, he may have his common-law judgment for the surface, and also a judgment following the lode under other public lands. (Bullion M. Co. *vs.* Crœsus G. & S. M. Co., 2 Nev., 168.)

**Estoppel.**—When A first locates a ledge on certain croppings extending eight hundred feet northward and southward, B afterwards locates a claim near by and is encouraged to go to work by A, who declares it to be his opinion that there are two ledges and that their claims will not interfere. Afterwards it turns out there are in fact two distinct ledges running into the earth at different angles, and widely diverging as they go down, but both mingling their croppings together where A made his older location. The declaration of A is evidence he located but one ledge, and may operate as an estoppel against his claiming both. (Van Valkenburg *vs.* Huff, 1 & 2 Nevada, 115.)

**Suit to recover a blind lode.**—When a suit is brought for a blind ledge bounded by walls found at the depth of two hundred feet below the surface, the ledge only and no part of the surface can be recovered. (Bullion Mining Co. *vs.* Crœsus M. Co., 2 Nevada, 168.)

**Indivisibility of mines—Partition.**—Mines in land, when opened, are, from their nature, indivisible, and neither partition can be made at law, nor dower assigned by metes and bounds. The only partition that can be made is to order a

sale and divide the proceeds. (Lenfers *vs.* Henke, 73 Ill., 405.)

**Possessory claims — Partition.** — When a mining-claim upon the public lands is claimed and possessed by several as joint tenants, tenants in common, or as copartners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants the same as other real property. (Hughes *vs.* Devlin, 23 Cal., 501.)

MINE.

**Distinction between mine and quarry.**—In a quarry the surface is removed, and in mining the beginning only is on the surface, and a roof is left overhead. (Darvill, *vs.* Roper, 3 Drewry, 298; S. C. 24 L. J. Ch., 779; see Cleveland *vs.* Meyrick, 37 L. J. Ch. 125; S. C. 17 Law Times R. (N. S.) 238; Brown *vs.* Chadwick, 7 Irish C. L., 101.)

The distinction between mines and quarries stated at length. (Listowell *vs.* Gibbings, 9 Irish C. L., 223.)

**Quarry and mine.**—Whether a working be a mine or a quarry is a question of fact. And the court will not decide as matter of law that a freestone bed worked underground through a level is a mine. (Rex *vs.* Dunsford, 4 Nev. and Man., 349; S. C. 2 A. & E., 568; S. C. 1 H. & W., 93.)

**Mine and quarry—Distinguished.**—In order to determine whether an excavation in the earth constitute a mine or a quarry, we are to look to the mode in which the substance is obtained, and not its chemical or geological character. (Rex *vs.* Brettell, 3 B. & Ad., 424.)

Whether an excavation be a mine or a quarry is a question of fact; a stone working, where the stone is won by sinking the shafts perpendicularly to the stratum which lies considerably below the surface, and the working the stratum by roads and gateheads, and raising the stone to the surface by machinery, or carrying it undergroud through a tunnel, in the same way as coal is usually got, as well as iron ore, constitute the working of a mine. (Rex *vs.* Sedgley, 2 B & Ad., 65.)

**Purchaser may conceal mineral worth.**—A person who knows that there is a mine on the land of another, of which the latter is ignorant, may nevertheless buy it. The ignorance of the vendor does not of itself render the transaction fraudulent on the part of the purchaser. (Harris *vs.* Tyson, 24 Pa. St., 347.)

**Pits.**—"Clay pits," excavations where clay for fire-brick and pottery purposes is obtained, worked by shafts, and like coal beds in this and other respects, are mines. (Rex *vs.* Brettell, 3 B. & Ad., 424.)

**Lime works.**—Lime works consisting of a quarry and kiln are not a mine. (Rex *vs.* Alberbury, 1 East., 534.)

MINERALS.

**Various meanings.** — The various meanings of the word minerals given and considered. (Darville *vs.* Roper, 3 Drewry, 298; S. C. 24, L. J. Ch., 779.)

**Extent of term.**—Everything except the surface-ground which is used for agricultural purposes, whether gravel, marble, fire-clay, or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land. (Midland Railway Co. *vs.* Checkley, Law R. 4, Eq. 24.)

**Minerals not sufficient to work.**—There is no certain criterion to determine between mineral lands and those that cannot be classed as such; lands may contain the precious metals, but not in sufficient quantities to work them as mines; the matter considered. (Ah Yew *vs.* Choate, 24 Cal., 562.)

**California mines—Burden of proof.**—An applicant for patent under the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California," must not only aver, but prove, that the lands contain no mines of gold, silver, copper, or cinnabar. (The Secretary *vs.* McGarrahan, 9 Wall., 299.) Mandamus to compel the issuance of a patent under that act cannot be sustained. (*Id.*)

**Railroad exceptions—Mineral lands not granted.**—The clause in the patent of the United States to the Western Pacific Railroad Company for land granted to aid the construction of its railroad, which excepts "all mineral lands, should any be found to exist in the tracts described," is equivalent to an exception of all the subdivisions which were mineral lands. "In other words, the patent grants all of the tracts named in it which are not mineral lands." (McLaughlin *vs.* Powell, 50 Cal., 64.) The fact cannot be assumed that all the lands described in such patent are mineral lands, as the exception does not necessarily extend to all the tracts granted. (*Id.*)

**Railroad exceptions—Quicksilver**—The court assumes, for the purposes of a decision, that lands containing cinnabar or quicksilver, are mineral lands within the meaning of the act of Congress of

July 1, 1862, granting lands to the Western Pacific Railroad Co. (*Id.*)

**Metalliferous ores—Paint stone.**—By a conveyance of all "mines and minerals," the grant does not embrace anything in the mineral kingdom, as distinguished from the animal and vegetable kingdom.

But the expression cannot be restricted to "metalliferous ores." And it includes mineral deposits in strata or beds as well as veins. And in this particular case it applied to a deposit of "paint stone" found on the premises, although when the deed was made the land may have been supposed to be valuable for copper ore alone. (Hartwell *vs.* Camman, 2 Stock. Ch., N. J., 128.)

**Stone.**—The term "mineral" is more frequently applied to substances containing metals, but in its proper sense includes all fossil bodies or matters dug out of mines; in this sense, beds of stone may be included in the word minerals. (Rosse *vs.* Wainman, 14 M. & W., 859; S. C., 2 Exch., 800; S. C., 15, L. J. Exch., 67.)

**Stone.**—Stone taken from quarries is a mineral. (Micklethwait *vs.* Winter, 6 Exch., 644; S. C., 5 Eng. L. & E., 526; S. C., 20 L. J. Exch., 313; Midland R. Co. *vs.* Checkley, Law R., 4 Eq., 24.)

**Asphaltum.**—Asphaltum is included in the exception in certain royal grants in the province of New Brunswick of "all coals, and also all gold, silver, and other mines and minerals." (Gesner *vs.* Gas Co., 1 James, Nova Scotia, 72; 2 Allen, N. B., 595.)

**Oil.**—Oil is a mineral, and is included in the act of 1850, relating to tenants in common, of minerals under the general enumeration of "other minerals." (Thompson *vs.* Noble, 3 Pgh., 201.)

**Oil.**—Oil is a mineral. (Kier *vs.* Peterson, 41 Pa. St., p. 357.)

**Petroleum.**—The peculiarities of petroleum as a fluid, and yet a mineral, stated. (Dark *vs.* Johnston, 55 Pa. St., 164.)

**China clay.**—A bed of China clay is included in a reservation of mines and minerals. (Hext *vs.* Gill, Law Rep. 7, Ch. App., 699.)

**Title to several kinds of minerals.**—The title to different kinds of minerals under the same land may be in different owners. (Curtis *vs.* Daniel, 10 East., 273.)

MINERAL LANDS.

**Construction—Uniform policy.**—In construing a particular or local act of Congress, the uniform legislation of the government in regard to its lead ore lands will be examined, to aid in the interpretation of such statute. (U. S. *vs.* Gear, 3 How, 120.)

**Equivocal words.**—Where the court perceives a settled policy in regard to a particular class of lands, especially such as are supposed to be of peculiar value, no equivocal words in the statute will be sufficient to allow a departure from such a policy. (Atty.-Gen. *vs.* Smith, 31 Mich., 360.)

**No title accrues against the U. S.**—No title to the public lands, whether mineral or otherwise, will accrue to any person against the United States by prescription, adverse possession, or estoppel *in pais*. (Doran *vs.* Central Pacific R. R. Co., 24 Cal., 245.)

The title of the United States can only pass from the United States by means of an act of Congress making a grant or authorizing a grant to be made through some person or officer. (*Id.*)

**Particles of gold.**—The mere fact that land contains particles of gold or veins of gold-bearing rock, does not necessarily impress it with the character of "mineral land," within the meaning of acts of Congress granting lands to the C. P. R.R., but reserving from the grant mineral lands. (Alford *vs.* Barnum, 45 Cal., 482.)

**Railroad—Ownership of minerals.**—Where land is condemned for railroad purposes, the company owns the earth and minerals above the level of the track, if their excavation be necessary for the construction of the road; minerals lying below the level of the road, and whose excavation is not necessary, belong to the owner of the land condemned. (Evans *vs.* Haefner, 29 Mo., 141. See Lyon *vs.* Gormley, 53 Pa. St., 261.)

**Railroad grant—Reservation of minerals.**—In ejectment against a defendant in possession of a portion of land described in the United States patent to a railroad, which reserves mineral lands, the defendant is entitled to show that the demanded premises are mineral lands, and therefore not parcel of the grant. (McLaughlin *vs.* Powell, 50 Cal., 64.)

**Evidence to establish character—Map of United States surveyor incompetent.**—Plaintiff offered to show that the land, on which the wood was cut, had been returned and denominated mineral lands on the map of the township, regularly made and filed by the United States surveyor: *Held*, That the testimony was properly excluded by the court. (Merrill *vs.* Dixon, 15 Nevada, 401.)

**Mineral must be valuable.**—The mere fact that the land contained "copper, gold, and silver-bearing quartz," does not impress it with the character of mineral land within the meaning of the act of Congress excluding mineral lands from the grant. Only lands valuable for mining purposes are reserved from sale. (*Ibid.*)

MINING-CLAIM.

**Term defined.**—Mining-claim is the name given to that portion of the public mineral land which the miner takes up and holds, in accordance with the mining laws, local and statutory, for mining purposes, and the term includes the vein specifically located, all the surface-ground located on each side of it, and all other veins or lodes having their apex inside the surface lines. (Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 439; Mallett *vs.* Uncle Sam M. Co., 1 Nev., 194; McKeon *vs.* Bisbee, 9 Cal., 137.)

**How held.**—A mining-claim on the public domain may be held either by actual occupancy, and the exercise of control over it by distinctly indicating the boundaries by monuments and marks, or by occupancy in accordance with the local mining customs. (Hess *vs.* Winder, 30 Cal., 349.)

**Must be located.**—Land must be marked out and taken possession of before it can be termed a mining-claim. (*Id.*)

**Subject to execution.**—A mining-claim on the public domain is property, and may be sold on execution. (*Id.*)

**Real estate.**—Mining-claims in Utah are real property, and pass by deed. (Houtz *vs.* Gisborn, 1 Utah, 173.)

**Personal property.**—A possessory right or "claim" on the public mineral lands is personal property. (Stewart *vs.* Chadwick, 8 Iowa, 463.)

**Possessory right.**—A miner's claim, being a mere possessory right on public lands, is personalty, and may be sold and conveyed by the administrator. (So held with regard to claim in Montana.) (Corbett *vs.* Berryhill, 29 Iowa, 157.)

**Estate of the locator.**—Persons claiming and in the possession of mining-claims upon the public lands of the United States are, as between themselves and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation of the land containing the mine. (Hughes *vs.* Devlin, 23 Cal., 501.)

**Requisites to give title thereto.**—On the public domain a miner may hold the place in which he may be working against all others having no better right. But when he asserts title to a full claim of 1,500 feet in length and 300 feet in width, he must prove a lode extending throughout the claim. (Zollars *et al.* *vs.* Evans, U. S. Circuit Court, District of Colorado, October term, 1880.)

**Ejectment — What necessary to maintain for mining-claims—Burden of proof.**—To maintain an action of ejectment for a mining-claim, the plaintiff must establish not only that he is in possession, but that a lode has been discovered on the claim prior to the commencement of action, and that such lode so discovered extends from the discovery-shaft to the ground for which he sues. These are facts to be determined by the jury, from a preponderance of the evidence. As to them, the burden is on the plaintiff. (*Ibid.*)

**Discovery of mineral, though made after location, will avail against strangers.**—Though the locators of a mining-claim may not, at the time of the location and survey of the claim, have sunk their shaft to the discovery of mineral in place, yet, if they shall thereafter so sink the shaft and find the lode, they will hold as against all who had not theretofore acquired an interest in the lode—the discovery relating back to the location. (*Ibid.*)

**Effect of reconveyance of title.**—S held a deed of mining ground as a mortgage to secure an existing indebtedness; he conveyed the premises to P, and after two or more transfers of the title the property was redeeded to S: *Held*, That when the title returned to S the same equities attached to it in his hands as existed at the time he made the conveyance to P. (Brophy M. Co. *vs.* Brophy D. G. and S. M. Co., 15 Nevada, 101.)

**Fraudulent representations—Sale of mine—Caveat emptor.**—The rule of *caveat emptor* only applies when buyer and seller have equal opportunities of knowledge, and when the defect complained of is patent and obvious to the senses. It does not apply to a case where the seller of a mine makes representations in respect to matters of which the buyer has no knowledge and no means at hand of obtaining knowledge. (Fishback *vs.* Miller, 15 Nevada, 428.)

**Vested rights.**—One who makes a valid location of a mineral lode or ledge and complies with all the mining laws, both local and national, obtains a vested right to such property, of which he can-

not be divested. (Blake *vs.* Butte M. Co., 2 Utah, 54.)

**Mining acts of 1866 and 1872.**—Under the law as it stood prior to May 10, 1872, each locator was entitled to but one vein, whereas under the act of Congress of May 10, 1872, he is entitled to all veins having the top or apex within the surface lines. (*Ibid.*)

**Judicial Sale—Title of purchaser.**—C was the purchaser at a sale of mineral land by the sheriff under an execution against V. The court found that V was holding the legal title in trust for T at the time of the sale, but that V had no interest when this action was commenced: *Held*, That the rule of *caveat emptor* applies to sales under execution, and that C had no title to the property. (Chumasero *vs.* Vial, 3 Mont., 376.)

**Freehold estates—Abandonment.**—Claims to public mineral lands are recognized as titles, as legal estates of freehold, for all practical purposes, except some doctrine of abandonment not perhaps applicable to such estates. (Merritt *vs.* Judd, 14 Cal., 60.)

(*See Location, Lode, Placer.*)

MINING GROUND.

**Technical meaning of the words.**—The words "mining ground," when used in a deed, have a technical meaning. They refer to that interest which a mere occupant of the mine has in the same. They are not the words used when a fee simple or leasehold interest in real estate is to be conveyed. (Hale & Norcross G. & S. M. Co. *vs.* Storey Co., 1 and 2 Nevada, 83.)

NAME.

**How imposed upon lode.**—Placing a notice of location, headed with a certain name upon a lode of ore, is to christen it with such name. (Phillpotts *vs.* Blasdel, 8 Nevada, 61.)

**Mining ledge may have several names.**—One and the same ledge may have two names by which it may be known indifferently; and it may even become better known under a name derived from a subsequent and invalid location than under the name given it in an earlier and valid location. (*Id.*)

**Sale of mine by another name.**—When a person conveys a lode of ore we have only to ascertain by the best means in our power what lode he meant; and if we can do so, it makes no difference that he has called it by a name illigitimately acquired by or applied to it. (*Id.*)

**Description at time of contract.**—Where the word "Pocotillo" mine is used in a contract to designate certain mining ground therein specifically described: *Held*, That it could not be claimed that a larger tract of ground, afterwards known as the Pocotillo mine, was intended. (Brandon *vs.* Pocotillo S. M. Co., 5, 6, & 7 Nevada, 499.)

NOTICE.

**Location notice—How given.**—The usual mode of taking up mining-claims is to put upon the claim a written notice that the party has located it, and this taking up and giving notice may be done by a party personally, or by any one for him, or with his assent or approval; and whenever the appropriation is made by an agent having authority from a principal to make it, the act is complete, and the title vests in the principal, and the agent, by his mere act, cannot subsequently divest it. (Gore *vs.* McBrayer, 18 Cal., 582.)

**Where to be posted.**—In order to hold a mining ledge it is not necessary that the notice of location should be placed on the ore or any part of the vein or lode; it is sufficient if it be placed in such reasonable proximity and relation to the ledge as, in connection with the work done under it, to give notice to all comers what ledge is intended. (Phillpotts *vs.* Blasdel, 8 Nevada, 61.)

**When can not be changed.**—If a mining custom allows a person to locate a lode or vein for himself and others by placing thereon a notice, with his own name and the names of those whom he may choose to associate with him appended thereto, designating the extent of his claim; and one person thus locates a lode for himself and several others, some of whom have no knowledge of the location, the persons who have no knowledge of the location by the same become tenants in common with the locator and the others, and cannot be divested of their interest by the locator afterwards tearing down the notice and posting up another omitting their names, unless this is done with their knowledge and consent. (Morton *vs.* Solambo C. M. Co., 26 Cal., 527.)

**Changing course of vein after notice is recorded.**—The notice as recorded was afterwards changed by striking out "westerly" and "easterly" as to the course of the veins and inserting the words "northerly" and "southerly:" *Held*, The alteration having been made without any fraudulent intent, that the change was immaterial and did not viti-

ate the notice. (Gleeson *vs.* Martin White M. Co., 13 Nev., 442.)

**Changing names of locators after notice has been recorded.**—Where the original notice of location was recorded and afterwards changed by the erasure of one of the names of the locators and the insertion of another: *Held*, That the notice and record, as so changed, was valid as to outsiders. (*Ibid.*)

**Misdescription.**—A misdescription in the notice of the claimant to a quartz-lead, posted up near the premises, in pursuance of the requirements of the mining laws of the district in which the lead is situated, and where the lead is underground and undeveloped, will not vitiate the claim. (Johnson *vs.* Parker, 10 Cal., 446.)

**Prospecting contract.** — Where G, McB, and others verbally agree to prospect for quartz, and to be equally interested in claims taken up, and McB discovered a claim and located it, by putting up a written notice with G's and other names on it, appropriating the lead: *Held*, That G's right attached by these proceedings, and could not be divested by the mere act of McB in taking down the notice and putting up other notices with other names. (Gore *vs.* McBrayer, 18 Cal., 582.)

**Paying channels in claim.**—If a company locates a mining-claim of a certain width, extending through a mountain from base to base, and afterwards another company succeeds to their possession, whatever it was, and puts up a notice stating that its claim comprises the claim held by the old company, * * and comprises the channel then existing, with its dips and angles, through the mountain, the latter company is not restricted by this notice to one paying channel within the claim. (Table Mountain Tunnel Co. *vs.* Stranahan, 31 Cal., 387.)

ORE.

**Words "silver-bearing ore" imply severance from freehold.**—The words "silver-bearing ore," as used in an indictment charging grand larceny of it, mean a portion of vein matter which has been extracted and separated from the mass of waste rock and earth, and imply severance from the freehold. (State *vs.* Berryman, 8 Nev., 262.)

PARTNERSHIP.

**What constitutes a mining partnership.**—If two or more persons acquire a mining-claim for the purpose of working the same and extracting the mineral therefrom, and actually engage in working the same, and share according to the interest of each, the profit and loss, the partnership relation subsists between them, although there is no express agreement between them to become partners, or to share the profits and losses. (Duryea *vs.* Burt, 28 Cal., 569.)

**A mining partnership.**—An agreement between one or more persons who claim an undeveloped mine, and another person, that if the latter will devote his labor and skill in exploring and developing the mine, the former will furnish him with tools and provisions, and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after development, constitutes one of those qualified partnerships common in California, known as mining partnerships. (Settembre *vs.* Putnam, 30 Cal., 490.)

**Prospecting partnership — How formed—Rights of partners.**—An agreement made between parties, by which some of them prospect for gold, and the others furnish money and provisions, for which they are to receive interests in the mining grounds that may be discovered, constitutes a prospecting partnership, and those who furnish the money and provisions are entitled to pre-empt and hold mining-claims under the laws of a district, which provide that claims shall be allowed the discoverers for their prospecting partners. (Boucher *vs.* Mulverhill, 1 Montana, 306.)

**Share of expenses.**—If one partner or tenant in common, after having become associated with his co-partners in the development of a claim, voluntarily leaves it in the possession of his co-tenants, and refuses to bear his just proportion of the expenses incurred by them in the development of it, and should afterwards bring his action to recover his interest, upon a proper showing to the equity side of the court, relief would be refused until he had paid his full proportion of the expenses incurred in such development. (Mallett *vs.* Uncle Sam Gold & Silver M. Co., 1 Nevada, 188.)

**Statute of frauds—Oral co-partnership for locating quartz-lode.**—A, B, and C entered into a verbal contract of co-partnership to prospect for, locate, record, pre-empt, develop, and mine quartz-lodes in Montana. Each party was to have the same interest in the property. The Silver Girdle lode was discovered by the parties, but it was recorded by B and C in their names, April

28, 1873. Afterward, in July, 1875, all the parties worked upon and developed the property. After the lode had been recorded D located and pre-empted a part of the Silver Girdle lode under the name of the Burlington lode, but the conflict of title was settled by a conveyance by D to B and C of 1,350 feet of the Burlington lode, which had been included in the Silver Girdle lode. B and C refused to give A any interest in the lode, or account for the proceeds thereof: *Held*, That the contract between A, B, and C was not within the statute of frauds, and could be enforced: *Held, also*, That the conveyance from D to B and C did not impair the rights of A. (Hibour *vs.* Reeding, 3 Montana, 15.)

**Conveyance.**—A member of a "mining partnership" may, without dissolving it, convey his interest in the mine and business. (Kahn *vs.* Smelting Company, 12 Otto, 641. See previous page, Part IV.)

**Exists when.**—A mining partnership is held to exist where the several owners of a mine merely co-operate in the working of the mine. (Charles *vs.* Eschleman, 4 Colorado Supp., 75.)

**Power of mining partner to bind his associates.**—A member of a mining partnership has no power to bind his associates by a contract made with an attorney to manage certain suits involving the title of the common property, the mine. (*Ibid.*)

**Ratification of such contract.**—Such a contract made by one of the partners cannot be ratified by his associates, unless the employment was in their name, and not in his own, for a ratification can only be effectual between the parties when the act is done by the agent avowedly for, or on account of the principal. (*Ibid.*)

(See Reynolds *vs.* Kay, 9 B. & C., 356; Lyell *vs.* Sanborn, 2 Mich., 109; Dickinson *vs.* Valpy, 10 B & C., 128; Nisbet *vs.* Nash, 52 Cal., 540; Jones *vs.* Clark, 42 Cal., 180; Duryea *vs.* Burt, 28 Cal., 569, and Morrison's Mining Digest, p. 256 *et seq.*, and p. 297.)

PATENT.

**Senior patent on junior location.**—The patent of a mining-claim granted under the acts of Congress perfects the right initiated by location, and relates back to the date of location, cutting off all intervening claims, except where the patentee has neglected to adverse the claim of an intervening or later location; in which case, under the provisions of said acts, such failure is a waiver of the priority. (Eureka Cons. M. Co. *vs.* Richmond M. Co., 4 Sawyer, 317.)

**Patent to land carries the precious metals.**—A patent from the United States for land in California, issued upon a confirmation of claims held under grants of the former Mexican Government, invests the patentee with the ownership of the precious metals which the land may contain. (Moore *vs.* Smaw, and Fremont *vs.* Flower, 17 Cal., 199.)

**Interest passed by patent.**—A patent of land from the United States passes to the patentee all the interests of the United States, whatever it may be, in everything connected with the soil, or forming any portion of its bed or fixed to its surface; in short, everything embraced within the term "land." (*Ibid.*)

**Agricultural claim—Patent for land containing gold.**—The fact alone that sufficient gold has been found upon land conveyed by such patent to induce the patentee to mine for that metal, and to extract from twenty-five to thirty dollars per day, with seven or eight hands, is not sufficient to destroy the verity of such record, and make the land mineral land within the meaning of said section eight. (Ah Yew *vs.* Choate, 24 Cal., 562.)

**Departure of vein from side lines.**—The survey of a mining-claim for the purpose of applying for a patent from the United States is the act of the claimant and not of the government, and if he has applied for patent before sufficient development has been made to show the strike of his vein, and if after the patent issues the vein is found to depart from the survey lines, it is lost to the patentee. The surveyor acts for the claimant, and he is not required either to discover or show the course of the vein. (Wolfy *vs.* Lebanon M. Co., 4 Col., 112.)

**Not retroactive.**—The act of Congress of July 26, 1866, is prospective in its operation, and does not qualify the effect of a patent issued before its passage. (Union M. Co. *vs.* Ferris, 2 Saw., 176.)

Where the land has been entered prior to the passage of the act of July 26, 1866, it is unaffected by that act, the same as if patented, by reason of the relation of the patent to the date of entry. (Union M. Co. *vs.* Dangberg, 2 Saw., 450.)

**Vein cannot be followed beyond side lines.**—Local customs which might have existed, allowing the owner to follow the course of the discovered lode, would be subordinate to the acts of Congress, and could not enlarge the grant of

a patent under the terms of the act of 1866. (Wolfly *vs.* Lebanon M. Co., 4 Col., 112.)

**Proof of receiver's receipt.**—To admit in evidence a certificate of entry of the register of the United States land office showing a mining-claim in controversy to have been entered for patent, it is necessary to first prove the signature of the register. (Jackson *vs.* McMurray, 4 Col., 76.)

**Under location made prior to May 10, 1872.**—A patent of a mining-claim based upon a location made under the act of 1866, grants the government title to the surface-ground mentioned therein, subject to the right of other locators to follow any other vein or lode legally held under locations made prior to the act of May 10, 1872. (Blake *vs.* Butte M. Co., 2 Utah, 54.)

**Right to follow unpatented vein into patented ground.**—The owner of a vein located prior to May 10, 1872, and who was in the possession thereof at such date, has the right to follow his vein within the patented surface-ground of another. (*Ibid.*)

**Patent title—Relation of.**—A patent title when granted relates back to the first initial valid step, which is the foundation of the right and in pursuance of which the patent is issued. (Kahn *vs.* Old Telegraph M. Co., 2 Utah, 174.)

**Patent title—Relation of.**—As a location notice in the acquisition of mineral lands is the first step in that direction, the same is proper evidence in connection with the patent to show the claim to which the patent refers. (*Ibid.*)

**Patent of mining-claim.**—A patent to a mining-claim passes whatever title the government had to the surface and any vein or veins beneath it not otherwise granted; and its issuance presumes a compliance with the mining laws. (*Ibid.*)

**Notice of location.**—A notice of location of a mining-claim should contain a description of the premises located, and the same should be marked on the ground. (*Ibid.*)

**Fraud in procuring a patent—Who may attack.**—Where fraud has been practised in procuring a patent from the United States only the United States can attack such patent. (Meyendorf *vs.* Frohner, 3 Mont., 282.)

**Re-location of mining ground.**—A party in possession of mining ground under a title, subsequently determined in court as invalid, may without fraud relocate such ground and thereafter perfect such title in accordance with the United States laws. (*Ibid.*)

**Equity—Trustee and cestui que trust.**—A party must first show himself entitled to a patent from the United States upon his equitable title before he can have another, who has secured a patent title by alleged fraudulent means, adjudged a trustee of such title for his use. (*Ibid.*)

PLACER-CLAIM.

**Occupied jointly.**—Placer-claims may be located and occupied jointly. (Chapman *vs.* Toy Long, 4 Sawyer, 28.)

**Statutory construction—Act relating to mining-claims—Record of discovery.**—At the trial of this action to determine the right to the possession of certain placer mining ground, M offered evidence to prove that he made and filed, in the office of the county recorder, a statement of his discovery of the ground. The statute approved May 8, 1873, provides that this statement shall be made and filed when, "any mining-claim upon any vein or lode bearing * * * valuable deposits" is discovered: *Held*, That a vein or lode bearing valuable deposits does not include a placer mining-claim, and that the discoverer of placer mining ground is not required, by the laws of the Territory to make or file for record a statement of its discovery: *Held, also*, That the evidence is inadmissible. (Moxon *vs.* Wilkinson, 2 Montana, 421.)

**Definition — Distinguished from vein.**—"Placers are superficial deposits which occupy the beds of ancient rivers or valleys." (*Ibid.*)

The distinction between veins and placers given. (*Ibid.*)

A vein does not include a placer deposit. (*Ibid.*)

POSSESSION.

**Vested rights of property.**—Persons claiming and in the possession of mining-claims upon the public lands of the United States are, as between themselves and all other persons except the United States, owners of the same, having a vested right of property founded on their possession and appropriation of the land containing the mine. (Hughes *vs.* Devlin, 23 Cal., 501.)

**Rights of miners.**—A miner appropriating a piece of the public domain for mining purposes has a right to the exclusive possession of the ground taken up. (Gottschall *vs.* Melsing, 1 & 2 Nevada, 704.)

**Possession prima facie evidence of title.**—The plaintiff need not show, in

the first instance, that he was in possession in accordance with the local laws, but may (as a vendee under a deed may as to other lands) make a *prima facie* case upon possession, and this is enough until the defendant shows that the possession is wrongful because in violation of rules which justify him in going upon the premises and working them. (English *vs.* Johnson, 17 Cal., 107.)

**Entry for survey is possession.**—Plaintiff was in actual possession of a placer-claim; defendant surveyed the premises for patent, and plaintiff filed his adverse claim and brought a suit in ejectment to support it: *Held*, That defendant's entry for the purpose of survey was a sufficient possession to enable plaintiff to maintain ejectment against him for the recovery of the premises; that plaintiff having proved an actual occupancy, though without connecting it with any record or paper title, and without showing the mining rules or any compliance with them, had made out a *prima facie* case sufficient to justify a recovery, until attacked by a prior possession or other title in the defendant. (Sears *vs.* Taylor, 4 Col., 38.)

**Possession presumes title.**—In actions of ejectment against a mere intruder (a defendant offering no evidence,) proof of possession in the plaintiff and an entry amounting to an ouster by defendant is sufficient to support a verdict. (Sears *vs.* Taylor, 4 Col., 38.)

**Mineral lands—Occupants of.**—The public mineral lands of this State are open to the appropriation of any one; and the first one occupying any portion of the same makes it his by the act of occupancy; and once his, it continues his until he manifests his intention to part with it in some manner known to the law. (Richardson *vs.* McNulty, 24 Cal., 339.)

**Deeds.**—Whether deeds relied on in addition to possession have been properly or improperly admitted, becomes immaterial, where the testimony is sufficient to sustain a verdict for the party on his possession alone. (Jackson *vs.* McMurray, 4 Col., 76.)

**Possession of one member of a company.**—The possession of a mining-claim by a company composed of several persons, is the possession of each one of its members of his undivided share. (Patterson *vs.* Keystone Mining Company, 30 Cal., 360; Waring *vs.* Crow, 11 Cal., 366.)

**Mining-claim — How defined.** — A mining-claim must be in some way defined as to limits before the possession of or working upon part gives possession to any more than the part so possessed or worked. But when the claim is defined, and the party enters into in pursuance of mining rules and customs, the possession of part is the possession of the entire claim. (Attwood *vs.* Fricot, 17 Cal., 38.)

**Possession Regulated by local rules.**—Mining-claims are held by possession, but that possession is regulated and defined by usage and local and conventional rules; and the "actual possession" which is applied to agricultural land, and which is understood to be a *possessio pedis*, cannot be required in case of a mining-claim, in order to give a right of action for the invasion of it. (Attwood *vs.* Fricot, 17 Cal., 38.)

**Possession as title.**—A party in possession of public mineral land is entitled to hold it as against all the world—the government excepted, if the land belong to it—subject only to the qualification that, upon land taken up for other than mining purposes, a right of entry for such purposes may attach. (Lentz *vs.* Victor, 17 Cal., 271.)

**Claim distinctly marked—Possession of part is possession of the whole.**—Where a claim is distinctly defined by physical marks, possession taken for mining purposes embraces the whole claim thus characterized, though the actual occupancy or work done be only on or of a part, and though the party does not enter in accordance with mining rules, or under a paper title. The rule which applies to agricultural lands, and holds to a more strict interpretation of a *possessio pedis*, does not apply to such a case. (English *vs.* Johnson, 17 Cal., 107.).

**Character of possession.**—The character of the possession necessary to work mining-claims will vary with the nature of the mines, the mode adopted in working them, and, perhaps, with the character of the country. (Correa *vs.* Frietas, 42 Cal., 339.)

**Early customs on the Pacific coast.**—In the early days in Nevada, the actual transfer of the possession of a mining-claim with a view of passing the title, followed by an actual possession of the transferee, acquiesced in by the party transferring it, was a valid transfer of such claim. Any other ruling would disturb many old and valuable titles on the Comstock lode. (Kinney *vs.* Cons. Vir. Co., 4 Saw., 451.)

**Vein opened at different points—**

**Actual and constructive possession.**—While property owned by the same person was worked at different points, under different locations, upon separate discoveries, under different names—the Elkhorn lode and the Casket lode—the owner, A, conveyed the Elkhorn lode to B, delivering possession of the Elkhorn works, but retaining possession of the Casket works. By subsequent development, the Elkhorn lode and Casket lode were shown to be the same; upon the question as to which party was in possession of the Casket workings: *Held*, That the constructive possession of the grantee must, as matter of fact, yield to the actual possession retained by the grantor. (Hugunin *vs.* McCunniff, 2 Col., 367.)

**Mode of holding a mining-claim.**—A mining-claim on the public domain may be held either by actual occupancy, and the exercise of control over it by distinctly indicating the boundaries of it by monuments or marks, or by occupancy in accordance with the local mining customs. (Hess *vs.* Winder, 30 Cal., 349.)

**Where no mining laws exist.**—Where no mining laws exist, the miner locating a claim would hold only by actual occupancy, and by such work for the development of the mine as would, under all the circumstances, be deemed reasonable, and his right of possession would only be continued by occupancy and use. (Mallett *vs.* Uncle Sam G. & S. M. Co., 1 & 2 Nevada, 157.)

**Principle of constructive possession.**—The condition of the possessor in such instances is no worse than that of the occupant of other real estate, in which case the principle above stated applies. But this principle does not touch the case of an entry into possession in pursuance of mining rules and regulations, as for a forfeiture or abandonment, etc., but applies where possession is taken independently of such rules. (Attwood *vs.* Fricot, 17 Cal., 38.)

**Mining ground, how held.**—A party claiming mining ground not actually possessed and worked, and beyond the *possessio pedis*, must show his right thereto by constructive possession, and he can show such constructive possession only by physical works or monuments, or by the local mining laws and rules, and compliance therewith. (Roberts *vs.* Wilson, 1 Utah, 292.)

**Constructive possession.**—Actual possession of a portion of a mining-claim, according to the custom of miners, in a given locality on the Yuba river, extends by construction to the limits of the claim held in accordance with such customs. (Hicks *vs.* Bell, 3 Cal., 219.)

**Working a level.**—The possession of a level in a mine on a lode gives possession for the length of that level from the surface to the centre of the earth. (Hugunin *vs.* McCunniff, 2 Col., 367.)

**Constructive possession under deed.**—As to the extent of a miner's possession under a written claim or color of title, his possession, except as against the true owner or prior occupant, is good to the extent of the whole limits described in the paper, though the possession be only of a part of the claim. (English *vs.* Johnson, 17 Cal., 107.)

**Constructive possession—How established.**—Constructive possession can only be established by the proof of three facts, to wit: 1st. That there were local mining customs, rules and regulations in force in the district embracing the claims; 2d. That particular acts were required by such mining laws or customs to be performed in the location and working of claims, as authorized by such laws; and 3d. That plaintiff has substantially complied with these requirements. (Pralus *vs.* Jefferson G. & S. Mining Co., 34 Cal., 558.)

**Proofs—How made—Actual possession.**—Each party must prove his claim to the premises in dispute, and the better claim must prevail. Actual possession makes out a *prima facie* case for the contestant, and throws upon the defendant the burden of proving a superior right in himself. (Golden Fleece *vs.* Cable Consolidated M'g Co., 12 Nev., 312.)

**Under parol sale, or unrecorded bill of sale.**—The possession of one claiming under a parol sale, or unrecorded bill of sale, in order to impart notice to a subsequent purchaser, need not be evidenced by an actual inclosure or anything equivalent thereto. (Patterson *vs.* Keystone Mining Company, 23 Cal., 575.)

**Action under section 254 of California practice act.**—To maintain an action to quiet title to mining claims on the public domain, under section two hundred and fifty-four of the practice act, the plaintiff must establish an actual or constructive possession in him at the time of commencing the action. (Pralus *vs.* Jefferson G. & S. M. Co., 34 Cal., 558.)

**True title outstanding.**—In actions where prior possession is relied on by the plaintiff, the defendant cannot justify his entry by showing the true title out-

standing. (Richardson *vs.* McNulty *et al.*, 24 Cal., 339.)

**Undivided interest.**—The owner of an undivided interest in a mine is entitled to the possession of the whole mine, as against one who has not title to any portion of the mine. (Melton *vs.* Lambard, 51 Cal., 258.)

**Acts as proof of possession.**—No acts are required as evidence of the possession of a mining-claim, other than those usually exercised by the owners of such claims. A miner is not expected to reside on his claim, nor build on it, nor cultivate it, nor enclose it. He may be in possession by himself, or by his agents or servants. (English *vs.* Johnson *et al.*, 17 Cal., 107.)

**Work evidencing possession.**—Going on the lead to work it, or even work done in proximity and in direct relation to the claim, for the purpose of extracting or preparing to extract minerals from it—as, for example, starting a tunnel a considerable distance off, to run into the claim—would be a possession of the claim within the meaning of the rule. (English *vs.* Johnson, 17 Cal., 107.)

**Evidence of possession.**—To prove a right to the possession of the ground, M offered evidence to prove that he dug a ditch after the filing of his adverse claim in the land office, to mine the ground, and that he occupied a dwelling-house and blacksmith shop upon the ground: *Held*, That the evidence is not admissible, and does not tend to prove that M possessed the ground as a miner or that it is mineral land. (Moxon *vs.* Wilkinson, 2 Montana, 421.)

**Proof of actual possession not necessary.**—Plaintiff may sustain this action without proving actual possession. A right to the possession is all that is necessary. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nevada, 312.)

**What findings must show.**—To support a decree granting title based on actual possession of mining ground, the findings must show that the party has had possession of a definite part of the ground. (Gelcich *vs.* Moriarty, 53 Cal., 217.)

**Action to quiet title to mining-claim on public lands.**—In an action brought under the two hundred and fifty-fourth section of the practice act, to quiet title to a quartz mining-claim, located on the public lands of the United States, a possessory title thereto is sufficient to maintain the action by a party in possession, as against one out of possession. (Pralus *vs.* Pacific G. & S. M. Co., 35 Cal., 30.)

**Possession of mining ground—How proved.**—Proof of a clearly defined surface claim surveyed and marked by the United States surveyor in accordance with law, including a quartz lode running with the claim, and work on the vein inside of the surface claim, and within lines of disputed ground, is proof of possession sufficient to put the defendant on proof of its right. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nev., 312.)

**Possession of part of claim.**—If a party enters upon a mining-claim *bona fide*, under color of title, as under a deed or lease, the possession of part as against any one but the true owner or prior occupant is the possession of the entire claim described by the paper, and this, though the paper did not convey the title. A third person could not invade the possession of the party taking it under such circumstances, and set up, as against him, outstanding title in a stranger, with which he had no connection. (Attwood *vs.* Fricot, 17 Cal., 37.)

**Presumption as to use of entire claim.**—If parties are allowed by mining regulations to include within their claim land outside of that which they expect to work, it will be presumed, in the absence of proof to the contrary, that it is for the convenience of working the claims, and that its possession is necessary. (Correa *vs.* Frietas, 42 Cal., 389.)

**Ejectment where possession of part of well defined claim is shown.**—Possession of mining ground acquired by an entry under a claim for mining purposes, upon a tract the bounds of which are distinctly defined by physical marks, accompanied with actual occupancy of a part of the tract, is sufficient to enable the possessor to maintain ejectment for the entire claim, although such acts of appropriation are not done in accordance with any local mining rule. (Table Mountain Tunnel Co. *vs.* Stranahan, 20 Cal., 198.)

**Right of possession—Parol sale.**—The right to a mining-claim upon the public lands rests upon possession only, and a sale by parol by one in possession, accompanied by a transfer of possession, transfers the title. (Gatewood *vs.* McLaughlin, 23 Cal., 178.)

**Presumption from possession.**—Where plaintiff claims, under purchase and location, a small tract of mineral land, with demarked limits, of which he is in possession, and there is no proof on the trial that the extent of his claim is

opposed to local rules, the presumption is that his possession is rightful and not wrongful. (English *vs.* Johnson, 17 Cal., 107.)

**Change of possession of an interest in a claim.**—The withdrawal of a member from a participation in the affairs of a mining company, and another taking his place and representing his undivided interest, is a change of possession of that undivided interest. (Patterson *vs.* Keystone M. Co., 30 Cal., 360.)

**Possession of a claim—Rights under.**—In suits for mining-claims the court charged the jury, in effect, that possession taken of a mining-claim, without reference to mining rules, was sufficient as against one entering by no better title to maintain the action; and further, that this possession need not be evidenced by actual inclosure, but, "if the ground was included within distinct, visible, and notorious boundaries, and if plaintiffs were working a portion of the ground within those boundaries," this was enough against one entering without title: *Held*, That the instruction was right; that, though the regular and usual way of obtaining possession of mining-claims be according to the mining regulations of the vicinage, still a possession not so taken is good against one taking possession in the same way, and that the actual prior possession of the first occupant would be better than the subsequent possession of the last. (English *vs.* Johnson, 17 Cal., 107.)

**Right of owner to every portion of mining-claim.**—Evidence that a portion of a mining-claim is not valuable for mining purposes is not admissible, on general principles, to prove that the owner of the claim has no right to hold such portion. (Correa *vs.* Frietas, 42 Cal., 339.)

**Town lot—Enclosing mineral land.**—A party cannot, under pretence of holding land in exclusive occupancy as a town lot, take up and enclose twelve acres of mineral land, in the mining district, as against persons who subsequently enter upon the land in good faith for the purpose of digging for gold therein, and who, in such operations, do no injury to the comfortable use of the premises as a residence, or for the carrying on of any mechanical or commercial business. (Martin & Davis *vs.* Browner, 11 Cal., 12.)

**Entry on land for mining purposes.**—Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: 1. That the land is public land. 2. That it contains mines or minerals. 3. That he enters for the *bona fide* purpose of mining. And such justification must be affirmatively pleaded in the answer, with all requisite averments to show a right under the statute or by law to enter. (Lentz *vs.* Victor, 17 Cal., 271.)

RECORDS.

**Local rules.**—The record is to be provided for, and its effect determined by the local laws or regulations of miners in the respective mining-districts; and if they fail to provide for a record, then none is required. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nevada, 312.)

**Accurate description.**—If a record is provided for by local rules, it must, under the provisions of the mining laws of the United States, contain an accurate description of the *locus* of the claim by reference to natural objects or permanent monuments. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nevada, 312.)

**Destroyed by fire.**—Where the original records of mining-claims of a certain district have been destoyed by fire, and the miners, by a resolution subsequently passed, required the claims to be re-recorded in a new book, such book may be admitted in evidence in the trial of an ejectment case for a mining-claim, to show that the rules of vicinage had been complied with. (McGarrity *vs.* Byington, 12 Cal., 426.)

**Mining recorder—Proof as to record of claim when inadmissable.**—Proof of a record is irrelevant without proof of some regulations making a record obligatory, or giving it some effect. The public law does not itself create any such office as mining recorder; nor does it make the recording of claims obligatory, or give to a record any effect. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nevada, 312.)

**Title not disclosed.**—The record of the certificate of location of a mining-claim does not necessarily disclose the title. (Patterson *vs.* Hitchcock, 3 Col., 533.)

RE-LOCATION.

**Alien.**—Where the first claimant who takes up the claim is not a citizen, or has forfeited his right by non-compliance with the mining laws, or abandoned his claim, the mining ground staked off by him is open to location by any citizen of the United States. (Golden Fleece *vs.*

Cable Consolidated M. Co., 12 Nevada, 312; King *vs.* Edwards, 1 Montana, 235.)

**Under another name.**—There is no law to prevent a person from re-locating his own mining-claim by a different name; and if he does so, and then conveys it by the latter name, there is no reason why the existence of the former location should invalidate the deed. (Phillpotts *vs.* Blasdel, 8 Nevada, 61.)

**Second location when not an abandonment of the first.**—When one or more of the parties first locating mining ground afterwards made a second location upon the same lode, with the names of other parties added to the notice of location, it appearing that at the time of the second location the ground was undeveloped, and it was not known that both notices were upon the same lode, and it further appearing that the second notice was posted for the express purpose of protecting the original location: *Held*, That the second location did not of itself constitute an abandonment of the first location. (Weill *vs.* Lucerne M. Co., 11 Nev., 201.)

**Abandonment.**—If several, as tenants in common, locate a mining-claim on the public lands, and, by a failure to comply with the local mining laws, forfeit the same, it may be re-located by a part of the first locators along with others who were strangers to the first location; and the tenants in common, whose names are left out in the notice of re-location, cease to have any interest in the mine. (Strang *vs.* Ryan, 46 Cal., 33.)

**A new discovery when.**—The relocation of an abandoned claim by a prospector, outfitted by another under an arrangement to share equally in all discoveries, etc., treated the same as if the prospector had located a new discovery. (Murley *vs.* Ennis, 2 Col., 300.)

RIGHT OF WAY.

**Vested rights of miners—Compensation — Highway.** — Lands of the United States, in which miners have vested rights, cannot be taken for the public use for a highway, if there is no act of the legislature providing for a just compensation to the miners. (Robertson *vs.* Smith, 1 Mont., 410.)

**California easement act of 1870.**—The act of 1870, providing for the condemnation of the right of way over or through a mining-claim for ditches, tunnels, flumes, etc., necessary for the convenient working of another mining-claim, is merely cumulative, and does not have the effect of excluding a party from the enforcement in court of the right to construct such tunnels, ditches, flumes, etc., where that right exists independent of the statute, as by local custom. (Bliss *vs.* Kingdom, 46 Cal., 651.)

SALE.

(*See Conveyance.*)

**Real estate.**—Mining-claims are real property and pass by deed. (Houtz *vs.* Gisborn, 1 Utah, 173.)

**Verbal sale of real estate.**—A gold mine is real estate, and an interest therein, other than an estate at will or for a term not exceeding one year, can be transferred only by an instrument in writing. A verbal sale is not good. (Melton *vs.* Lambard, 51 Cal., 258.)

**Bill of sale as evidence.**—It is no objection to a bill of sale that it is not under seal, whatever may be the effect of it as evidence. (Jackson *vs.* Feather River Water Co., 14 Cal., 19; see McCarron *vs.* Connell, 7 Cal. 152.)

**Verbal power to execute a bill of sale.**—A verbal power is sufficient to authorize an agent to sign the name of the grantor to a bill of sale of a mining-claim, where the grantor has first agreed in person with the grantee upon the terms of sale. (Patterson *vs.* Keystone M. Co., 30 Cal., 360.)

**Handwriting of subscribing witness.**—A bill of sale of a mining-claim is sufficiently proved when the handwriting of the subscribing witness who is absent from the State, and the execution by the vendor, is proven. And this though the subscribing witness was in the State after suit was instituted, and near the time of trial, and plaintiff used no efforts to get the testimony of the witness before he left the State. (Jackson *vs.* Feather River Water Co., 14 Cal., 19.)

**Dormant partner.**—Where one of the mining company acted as salesman of the firm, it cannot be pretended that he was a dormant partner, whose acts would not bind the firm. (Rich *vs.* Davis & Co., 6 Cal., 163.)

**District record as evidence.**—The entry of the sale of a mining-claim made by the recorder of a mining-district, in a book kept for the record and transfer of mining-claims, and authorized by the mining customs and laws in force in the district where the claim is situated, is admissible in evidence to prove the sale of the claim, unless objected to. Such entry is at least secondary evidence of the sale. (St. John *vs.* Kidd, 26 Cal., 263.)

**Assumpsit—For money received on**

**sale of lode.**—If one who is in possession of a lode holding for himself and another make sale of the property, the latter may bring ejectment against the purchaser for his part, or he may affirm the sale and sue his associate in assumpsit for his part of the purchase-money. (Murley *vs.* Ennis, 2 Col., 300.)

**Gift of a mining-claim.**—The owner of a mining-claim may give away the same by a written bill of sale, and such bill of sale is not to be rejected as evidence because it was a gift. (Meyers *vs.* Farquharson, 46 Cal., 190.)

**Payment of purchase-money—What constitutes—Before receiving notice.**—A mining-claim was purchased for one thousand dollars in coin, and fifteen thousand shares of stock in a corporation thereafter to be formed. The money was paid, but only a portion of the certificates for shares of stock were delivered to the grantor before the purchaser received notice of the equities of plaintiff: *Held*, That the purchase-money was paid before notice. (Brophy M. Co. *vs.* Brophy & Dale G. & S. M. Co., 15 Nev., 101.)

**Possession—Not notice of unrecorded defeasance.**—The open and notorious possession by a grantor after sale and conveyance of property is not sufficient to impart notice to a subsequent purchaser for value of any unrecorded defeasance. (Brophy M. Co. *vs.* Brophy and Dale G. and S. M. Co., 15 Nev., 101.)

**Bona-fide purchaser—Not affected by any latent equity without notice.**—The *bona-fide* purchaser of a legal title is not affected by any latent equity of which he has no notice, actual or constructive. (Brophy M. Co. *vs.* Brophy and Dale G. & S. M. Co., 15 Nev., 101.)

**Bona-fide purchaser—Payment of purchase-money.**—To entitle a party to the character of a *bona-fide* purchaser without notice he must have acquired the legal title, and have actually paid the purchase-money before receiving notice of the equity of another party. (Moresi *vs.* Swift, 15 Nev., 215.)

SALINES.

**Reservation.**—A grant upon entry and survey, of lands reserved by law as salines, is void. (Edwards *vs.* Darby, 12 Wheat., 206.)

Where a State law directs the survey of certain lands, and the reservation of salines thereon, although there be no specific direction in the act to survey and set apart the salines, such direction is implied from the necessity of the case. (*Ibid.*)

"French lick," on site of Nashville, Tennessee—case deciding whether the same had been reserved, or was open to entry under laws of North Carolina and Tennessee. (*Ibid.*)

**Grants to State springs not workable.**—The acts of Congress granting salt springs to the State, construed as intending only salt springs which could be made of value in the manufacture of salt; and held not to apply to a case where a well-known saline existed, but all attempts to make it of any value had failed. (Indiana *vs.* Miller, 3 McL. C. Ct., 151.)

**Salt lick is a salt spring.**—A salt lick and a salt spring mean the same as used in the act of Congress, "lick" being a Western term applied to a salt spring on account of the deer resorting to it to lick the salt. The distinction cannot be made referring spring to a fountain of salt water, and lick to a place where salt water appears on the surface of the ground. (*Ibid.*)

**Missouri rented salines.**—The act of December 30, 1824, relating to distress for rent of the State salines, does not apply to leases made prior thereto. (Craig *vs.* Barcroft, 1 Mo., 656.)

SCHOOL SECTIONS.

**Michigan.**—The grant of the sixteenth sections to the State of Michigan for school purposes contains no express or implied reservation of salt springs, lead mines, or minerals of any kind. (Cooper *vs.* Roberts, 18 How., 179. See 20 How., 467, and 3 Wall., 332.)

STATUTE OF LIMITATIONS.

**Adverse possession.**—The act of Congress of 1872, in relation to the location of mining-claims and the determination of the right thereto in case of conflict, does not prevent the application of the State statute of limitations; on the contrary, an actual, exclusive, and uninterrupted adverse possession for the statutory period constitutes a complete bar. (420 Min'g Co. *vs.* Bullion M. Co., 9 Nevada, 240.)

SURFACE-GROUND.

**Common law modified.**—The common law doctrine, that he who possesses the surface of the earth owns all to the centre of earth, is greatly modified as to the rights of miners and others on the public lands. One may be entitled to the occupancy of the surface, another to the veins of mineral running under the same land. (Bullion M. Co. *vs.* Crœsus G. & S. M. Co., 2 Nev., 168.)

**The surface-ground and the lode are not independent grants.**—It is not the purpose of the act to grant surface-ground without a discovered lode. The lode is the principal thing, and the surface-ground incident thereto. (Wolfley *vs.* Lebanon M. Co., 4 Col., 112.)

**Vein the principal object.**—The vein is the principal object of the locator; the surface claim ought always to conform in its course; and end lines ought to be parallel and at right angles to the side lines. (Gleeson *vs.* Martin White M. Co., 13 Nev., 442.)

**Reasonable time to define claim.**—The surface claim is not required to be defined immediately upon the discovery of the vein; the location is allowed a reasonable time for that purpose. (Gleeson *vs.* Martin White M. Co., 13 Nev., 442.)

**Surface recovered when.**—When a ledge located as such comes to the surface, the locator may recover the surface, provided the outline of the ledge is visible on the surface. (Bullion M. Co. *vs.* Crœsus G. & S. M. Co., 2 Nev., 168.)

**Marking of centre line of surface claim.**—Where the locators of a mine having a monument, notice, and work at the discovery point, post two stakes along the centre line of the claim, and one three hundred feet southeast of location monument, marked "southeasterly stake of Paymaster," the other twelve hundred feet northwest of monument marked "northwesterly stake of Paymaster," these stakes being in a line with the croppings of the vein and discovery point: *Held*, A sufficient marking of the boundaries of the location of the claim, "so that its boundaries can be readily traced." (Gleeson *vs.* Martin White M. Co., 13 Nevada, 442.)

TAILINGS.

**Pay-dirt and tailings are property.**—The pay-dirt and tailings of a miner, which are the productions of his labor, are his property. (Jones *vs.* Jackson, 9 Cal., 237.)

**"Tailings" claims—Analagous to mining-claims.**—If land be valuable for the metals which it may contain, such as land on which tailings have been deposited, and it is not claimed for any other purpose, the acquisition of possessory titles to it is governed by the same rules ordinarily controlling possessory titles to mining-claims. (Rogers *vs.* Cooney, 5, 6, & 7 Nevada, 872.)

**Boundaries of ground for tailings—Custom—Free tailings.**—The boundaries of ground for the deposit of tailings must be distinctly defined by persons locating it, so that subsequent locators may know what ground is vacant. The custom of free tailings conflicts with this rule, and the defining of such boundaries would be useless. (Lincoln *vs.* Rodgers, 1 Montana, 217; Esmond *vs.* Chew, 15 Cal., 137; Logan *vs.* Driscoll, 19 Cal., 623.)

**Who entitled to tailings.**—Where tailings are allowed to flow upon the ground of another, he is entitled to them. (Jones *vs.* Jackson, 9 Cal., 237.)

**Property in mixed tailings.**—If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass. (Jones *vs.* Jackson, 9 Cal., 237.)

**Damages by custom—Free tailings.**—The first locators of mining ground have no right, by custom or otherwise, to allow tailings to run free in the gulch, and render valueless the mining-claims of subsequent locators below them. (Lincoln *vs.* Rodgers, 1 Montana, 217.)

**Deposit for tailings.**—When a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose, provided he does not interfere with pre-existing rights. His intention to appropriate such ground must be clearly manifested by outward acts. Mere posting notices is not sufficient. He must claim the place of deposit as such, or as a mining-claim. (Jones *vs.* Jackson, 9 Cal., 237.)

**Possession of land valuable only for tailings.**—Where a person entered on vacant land upon which tailings were deposited, for the purpose of digging them up, hauling them away, and milling them, and caused a survey to be made and recorded, marked the boundaries with large posts firmly set in the ground at the corners and one in the centre of one of the sides, and thereafter continued to work the claim and build a cabin on it, which was used for storing the tools employed on the premises: *Held*, That he had a possession sufficient to maintain trespass against an intruder entering within his boundaries. (Rogers *vs.* Cooney, 7 Nevada, 213.)

**Prior rights.**—A party may take up a claim for mining purposes that has been, and still is, used as a place of deposit for tailings by another; but in that case his mining right will be subject to the prior right of deposit. (O'Keiffe *vs.* Cunningham, 9 Cal., 589.)

TENANTS IN COMMON.

**Effect of posting notice.**—After notices of location were posted and recorded, and the limits of the mine determined, all the locators became tenants in common. The acting locators could not dispose of the interest of their cotenants. (Chase *vs.* Savage Silver Mining Co., 2 Nevada, 9.)

**Action to vindicate title.**—After the notice was put up, G became a tenant in common of the mine, and not a partner, and could bring an action to vindicate his title against McB, or any one who excluded him or denied his right. (Gore *vs.* McBrayer, 18 Cal., 582.)

**Real estate—Tenants in common.**—Tenants in common of a tract of mining-claims, acting under a company name, are incapable, in the company name, of taking and holding mining-claims by grant, or by any other means by which title to real estate would pass. (Wiseman *vs.* McNulty, 25 Cal., 230.)

**Possession of tenant in common.**—The possession of one partner or tenant in common inures to the benefit of all, until such possession becomes adverse. (Mallett *vs.* Uncle Sam G. & S. M. Co., 1 & 2 Nev., 156.)

**Forfeiture.**—Several persons owning a tract of mining-claims as tenants in common, and known by a company name, have not the capacity to take or hold, in the name of the company, the interest of any one or more of the tenants in common, by forfeiture. (Wiseman *vs.* McNulty, 25 Cal., 230.)

**Forfeiture.**—In order to enforce the forfeiture of the interest of a tenant in common, some appropriate suit must be undertaken to liquidate the demand and sell his interest, or there must be clear and unequivocal proof of abandonment. (Waring *vs.* Crow, 11 Cal., 360. See Morrison's Mining Digest, p. 370.)

**Mining-claim.**—In ejectment for an undivided interest in a mining-claim in Nevada, where both parties derive title from the original owner, the validity and regularity of his location are not in question. (Union Cons. S. M. Co. *vs.* Taylor, 10 Otto, 37.)

Where the plaintiff was a tenant in common with the defendants, their possession of the claim was his possession until he was ousted. The statute of limitations would then run against him, but not bar his recovery, until after such ouster, their adverse possession was maintained two years before the commencement of the suit. (*Ibid.*)

Where the circuit court, under a written stipulation of the parties, tries the issue, its special findings should set forth the ultimate facts, and not the evidence establishing them. Where, therefore, both parties claimed under A, and the court found his ownership the chain of conveyances by which acquired, it need not be set forth. (*Ibid.*)

A conveyance in writing is not necessary to the valid transfer of a mining-claim. (*Ibid.*)

TIMBER.

**Prior agricultural claim carries the timber.**—The possession of public land in the mineral districts of this (California) State, acquired and held in accordance with the possessory act for agricultural purposes, carries with it the right to the wood and timber growing thereon, and this right is superior to that of subsequent locators of mining-claims who need, and seek to use, the wood and timber for carrying on their mining operations. (Rogers *vs.* Soggs, 22 Cal., 444.)

**Wood and water.**—The right to mine upon public lands carries with it, as incidents, the right to the use of wood and water found on the public domain and not previously appropriated. (Tartar *vs.* Spring Creek Co., 5 Cal., 395.)

**Unnecessary cutting.**—The defendant occupied seventy acres of public land as mining ground, and cut timber from four acres thereof in advance of his mining operations, and disposed of the same for his own benefit, assigning as a reason therefor that by cutting the timber in advance of the mining operations the stumps would rot, and therefore be more easily removed: *Held*, That this cutting was not necessary to the mining operation, and therefore unlawful. (U. S. *vs.* Nelson, 5 Sawyer, 68.)

**Legislative grant—Construction—Timber—Definition.**—By the act of Congress of July 1, 1862, entitled "An act to aid in the construction of a railroad," etc., the timber growing on the odd-numbered sections of public mineral land of the United States was granted to the Central Pacific Railroad Company of California, and under the term *timber* is included all trees and wood: *Held*, Accordingly that a subsequent patentee of such lands took no title to the timber. (Carr *vs.* The Central Pac. R.R. Co., 55 Cala., 192.)

**Mining ground.**—A person occupying a portion of the public land as mining ground under the mining laws of the United States is not bound to purchase

the same, but until he does so he has a mere license to work the ground for the precious metals therein, and has no right to cut or use any timber growing or found thereon, except as the same may be necessary to enable him to mine the same conveniently. (*Id.*)

TITLES.

**Purchaser only takes vendor's title.**—The purchaser of a mining-claim can only acquire, by such purchase, such right or title as his vendor had at the time of the sale. (Waring *vs.* Crow, 11 Cal., 366.)

**Severance.**—There may be a severance of the title in the surface, used for agricultural purposes, and the underlying minerals. (Stewart *vs.* Chadwick, 8 Iowa, 463.)

**Quartz claims are real estate—Descent — Administrator.** — The statute regulating the descent and distribution of realty are applicable to quartz claims; they are real estate. An administrator cannot maintain ejectment for their possession. (Carhart *vs.* Montana M. Co., 1 Mont., 245.)

**Vested title.**—Under existing legislation, the owner of a mining-claim has, *in practical effect*, a good vested title to the property, and should be so treated until his title is divested, by the exercise of the higher right of his superior proprietor. His right to protect the property, for the time being, is as full and perfect as if he were the tenant for years, or for life, of his superior proprietor. As his lease is of the *mine*, he is entitled to all the remedies for its protection that he could claim if he were the owner against all the world except the true owner. (Merced Mining Co. *vs.* Fremont, 7 Cal., 317.)

**Mining-claims and rights—Claims to public lands and titles.**—In this State claims to public mineral land are recognized as titles, as legal estates of freehold, for all practical purposes, if we except some doctrines of abandonment not, perhaps, applicable to such estates. (Merritt *vs.* Judd, 14 Cal., 60.)

**Titles to mining-claims—How acquired.**—It is not essential that mining districts should be organized and local rules adopted in order that mining-claims may be held and the government titles acquired. A compliance with the mining laws of the United States is sufficient to secure the claim. (Golden Fleece *vs.* Cable Consolidated M. Co., 12 Nevada, 312.)

**Neither party has title.**—In actions to recover possession of mining-claims located on the public lands, the doctrine that plaintiff, if he recover at all, must recover on the strength of his title, has no application, for neither party has any legal title. (Richardson *vs.* McNulty, 24 Cal., 339.)

**Possession as proof of title to land.**—The possession of agricultural land is *prima facie* proof of title against a trespasser; but, where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption, that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. (Burage *vs.* Smith, 14 Cal., 380.)

**Evidence of title.**—Where K admitted he acquired his interest in certain company mining claims by purchase, which admission was not withdrawn, evidence that K had acted as a member of the company, that the company had recognized him as a member, and the owner of said interest, and that he had paid assessments to the company thereon, was irrelevant, and incompetent to prove title to said interest in K. (King *vs.* Randlett, 33 Cal., 318.)

**Jury's verdict.**—The jury under a general submission found "a verdict in favor of plaintiffs with one dollar damages:" *Held*, That the verdict decided the question of title in favor of plaintiffs, and that upon it they were entitled to a decree perpetually enjoining defendants from working upon the ground claimed in the complaint; that this equitable relief was a matter of right, the denial of which by the district court was error. (McLaughlin *vs.* Kelly, 22 Cal., 211.)

**Title acquired after suit brought.**—A title to the premises acquired by plaintiffs after the commencement of the suit will not avail, since the rights of the parties must be determined by their position at the time of the trespasses. (Hugunin *vs.* McCunniff, 2 Col., 367.)

**Protection to valuable improvements.**—Certain possessory rights, and rights of property in the mining region, though not founded on a valid legal title, will be protected against the miner—as valuable permanent improvements, such as houses, orchards, vineyards, growing crops, etc. (Smith *vs.* Doe, 15 Cal., 100.)

**Not a subject for arbitration.**—The subject-matter of an action for the recovery of mining ground on public land is regarded in this State as "a question of

title to real property in fee," and therefore cannot, under section three hundred and eighty of the practice act, be submitted to arbitration; and if so submitted, an award and judgment thereon will, on motion, be vacated and set aside. (Spencer *vs.* Winselman *et al.*, 42 Cal., 479.)

**Title of mining company to quartz mine and mill.**—Certain real property, consisting of a quartz mine and mill, was owned and worked by a mining company consisting of M and S, who together owned two-thirds, and C and Y, who together owned the remaining one-third undivided interest therein. The profits and losses of the mining business were, by tacit agreement, shared by said members in proportions corresponding to their said several interests in the property. M and S conveyed by deed absolute their said two-thirds interest in said property to R, who immediately entered into and thereafter continued in possession of the same. A small portion only of the purchase price was paid down by R at said sale. At the date of said conveyance the company was indebted, on account of their said mining business, in the sum of twelve thousand dollars, for which afterward suit was brought against the said members of the company, and under a writ of attachment issued therein said property was levied on as the property of the said M, S, C, and Y, and in due course judgment passed against them, and all their right, title, and interest in the property was sold to H, who in due course received a sheriff's deed therefor, under and by virtue of which he thereafter claimed to own all said property: *Held*, In an action by R against H, brought under the 254th section of the practice act, that R acquired under said deed from M and S the title to said two-thirds undivided interest in said property, and that H acquired by said sheriff's deed only the one-third undivided interest of C. and Y in said property. (Ross *vs.* Heintzen, 36 Cal., 313.)

TOWN LOT.

**Delay for water—Notice given.**—A miner locating a parcel of the public domain as a mining-claim has a right to the exclusive possession of the ground so taken up. A miner cannot, by notice alone, without taking steps towards development, hold a claim for five years without work or occupation; especially when there is no intention to work it except on a very uncertain contingency. In this case a claim was located upon a spot which showed good pay if water could be had; and was worthless without water; the locator took no steps to bring water, and the natural supply was totally insufficient; meanwhile a town has been built upon and around the claim: *Held*, That the party asserting title to the property as a mining-claim was rightfully nonsuited. (Gottschall *vs.* Melsing, 2 Nev., 185.)

**Question of Fact.**—Whether a town lot located by a miner, for mining purposes, is so necessary for his use to enable him to work his mine as to make his right superior to that of a preemptor, in accordance with the act of Congress of July 1, 1864, in relation to town lots, etc., is a question of fact for the jury. (Courchanie *vs.* Bullion M. Co., 4 Nev., 369.)

TRESPASS.

**Extent of right of possessor.**—The owner and possessor of a mining claim on public land has a right to prevent any subsequent comer from erecting or constructing any superstructure, cut, or ditch on his claim, unless the right to construct the same is given by some mining custom or regulation. (Correa *vs.* Frietas, 42 Cal., 339.)

**No presumption of trespassing.**—When a party enters upon mineral land for the purpose of mining, he cannot be presumed to be a trespasser; for if the land be not private property, he has the right to enter upon it for that purpose; and until it be shown that the title has passed from the government, the statutory presumption (Wood's Dig., 257) that it is public land applies. (Smith *vs.* Doe, 15 Cal., 100.)

**Private mineral lands not subject to entry by miners.**—No license from the United States, or the State of California, to miners to enter upon the private lands of individuals, for the purpose of extracting the minerals in the soil. (Boggs *vs.* Merced M. Co., 14 Cal., 279; Henshaw *vs.* Clark, 14 Cal., 461.)

**Working across dividing line.**—When two mining claims adjoin each other, and the owners of one claim work across the dividing line and take away gold-bearing earth from the other claim, the fact that they did so in ignorance of the location of the dividing line is no excuse or justification; and it is error to admit evidence of such ignorance as an excuse for the trespass or in mitigation of damages. (Maye *vs.* Tappan, 23 Cal.,

306. See Morrison's Mining Digest, p. 378.)

**No right to, can be acquired by a mere trespasser.**—No right to mining-claims can be acquired by taking possession of a placer-claim or others, during their temporary absence, and surveying and filing locations of the same. (Murphy *vs.* Cobb, 4 Col. Supp., 72.)

**Unlawful entry—Possession—Color of right.**—Actual possession is *prima facie* evidence of title in the possessor and is protected by the law against lawless invasion without right or color of right. An entry upon such possession cannot be made in good faith, unless it is made upon some right or color of right, or claim of legal right to make the entry; and such claim of right must exist before the entry to constitute good faith. (Phœnix Mill and Mining Co. *vs.* Lawrence, 55 Cal., 143.)

TUNNELS.

**Enjoining interference with mining right.**—If by local custom the owner of one mining-claim has a right to construct a tunnel through an adjoining claim, in order to enable him to work his own claim, a court of equity may enjoin any interference with that right. (Bliss *vs.* Kingdom, 46 Cal., 651.)

**Discovery of blind lodes.**—The right of possession of veins or lodes granted by section four of the act of Congress of May 10, 1872, to tunnel owners, is dependent, among other things, upon *discovery* of the vein or lode in the tunnel. The effect of section two of the act is to give a party running a tunnel for any purpose, whether for prospecting or development, the right to pre-empt and locate any and all lodes not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface. (Corning Tunnel Co. *vs.* Pell, 4 Col., 507.)

WORK.

**Definition of term "work on a claim."**—Work on a claim is work done anywhere upon the surface of it within its surface lines, or anywhere below the surface within those lines extended down vertically; and though it should be shown that the work done within the lines below the surface was also within a lode having its apex outside of such vertical surface lines, it will still be work on the claim within the meaning of section 2324 of the United States Revised Statutes. (Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 439.)

**Regulations construed.**—Where the regulations of a mining locality require that every claim shall be worked two days in every ten: *Held*, That the efforts of the owners of the claim to procure machinery for working the claim are, by fair intendment, to be considered as work done on the claim. (Packer *vs.* Heaton, 9 Cal., 569.)

# PART V.

# MISCELLANEOUS.

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## *a.* FORMS.

### FORM 1.

**Notice of Location.**

Notice is hereby given that the undersigned, having complied with the requirements of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, and the local customs, laws and regulations, has located ——— linear feet on the ——— lode [twenty acres of placer mining ground], situated in ——— Mining District, ——— County, ———, and described as follows:

[*Describe the claim accurately (by courses and distances, if possible,) with reference to some natural object or permanent monument, and mark the boundaries by suitable monuments; if a placer claim is located on surveyed land, describe the legal sub-division.*]

Discovered ———, 188–. ——— ———, Locator.

Located ———, 188–. Recorded ———, 188–.

Attest:

———

———

NOTE.—Record of location notices, in absence of a District Recorder, should be made with the proper recorder of deeds for the county wherein the claim is situated. It is advisable to have these notices attested by witnesses, for locators cannot be too careful about their evidence.

In re-locations to increase width of surface ground under the local law, or to more particularly identify or describe the claim, use the above form, but state after the description that it is a re-location, and in addition, where the original location is recorded, in order that the title may revert back to the original discovery.

In locations of abandoned mines, the fact that it is such a location should be stated, and the affidavits of two or more respectable parties that such mine was abandoned and subject to re-location, should be recorded with the location notice.

Where the location is by agent, that fact should be stated after the name of the locator, thus: By Thomas Jones, agent (or attorney).

### FORM 2.

**Proof of Labor.**

——— *of* ———, *County of* ———, *ss.*

Before me the subscriber personally appeared ———, who being duly sworn says that at least ——— dollars' worth of labor or improvements were performed or made upon [here describe claim], situated in ——— mining district, ——— county, ——— of ———, during the year ending ———, 188–. Such expenditure was made by or at

the expense of ——— ———, owners of said claim, for the purpose of holding said claim.

[Jurat.] ——— ——— (Signature.)

NOTE.—The record of an affidavit like the above is *prima facie* evidence of the performance of such labor.

FORM 3.

**Notice of Forfeiture.**

——— County, ——— ———, 188-.

To—(names of all parties who have record title to any portion of the mine). You are hereby notified that I have expended ——— dollars in labor and improvements upon the ——— lode (describe the claim), as will appear by certificate filed ———, 188-, in the office of the recorder of said county (or district), in order to hold said premises under the provisions of section 2324 Revised Statutes of the United States being the amount required to hold the same for the year ending ———, 188-. And if within ninety days from the service of this notice (or within ninety days after this notice by publication), you fail or refuse to contribute your proportion of such expenditure as a co-owner, your interest in said claim will become the property of the subscriber under said section 2324.

——— ——— (Signature).

NOTE.—At the expiration of 180 days, this notice should be recorded with the affidavit of the newspaper publisher (see Form 13), that the same was published for the period of ninety days, together with the affidavit (Form 4) of the party signing the notice to the effect that one or more of the co-owners named in the published notice have not paid their share of the expenditure. This completes the record title.

FORM 4.

**Affidavit of Failure to Contribute.**

——— *of* ———, *County of* ———, *ss:*

——— ———, being duly sworn, deposes and says that for the year ending ———, 188-, he expended at least ——— dollars in labor and improvements upon the ———, lode [or ——— placer claim] (here describe the claim), to hold the same under the laws of the United States and of this ——— (district, Territory or State,): that due notice thereof was personally served upon ——— ———, co-owners, on the ——— day of ———, 188-, (or was duly published in the ——— ———, as appears from the affidavit of the publisher thereof): and that ——— ——— (of the said) co-owners have failed or refused to contribute their share of said expenditures within the time required by law.

——— ———.

Subscribed and sworn to before me this ——— day of ———, 188-.

——— ———.

FORM 5.

**Miner's Lien.**

KNOW ALL MEN BY THESE PRESENTS, That I, ———, of the county of ———, ——— of ———, do hereby give notice of my intention to hold and claim a lien, by virtue of the statute in such case made and provided, upon ——— (describe premises), with all improvements and appurtenances, situated in ——— Mining District, County of ——— , ——— of ———.

The said lien being claimed and held for and on account of *work and labor done by me as* ——— *for* ———, *owner of said premises* in and upon said premises, from the ——— day of ———, A. D. 188-, to the ——— day of ———, A. D. 188-.

The total value of the said work and labor being ——— dollars, upon which there has been paid the sum of ——— dollars, leaving a balance of ——— dollars still due, owing and unpaid to me, the said claimant.

——— ——— (Signature).

——— *of* ———, *County of* ———, *ss.*

On this ——— day of ———, A. D. 188–, personally appeared before me the above named ———, and who being by me first duly sworn, on ——— oath states that the abstract of indebtedness mentioned and described in the foregoing notice, is true and correct, and that there is still due and owing to ——— from the said ———, for the ——— aforesaid, the sum of ——— dollars and —— cents.

——— ——— (Signature).

Subscribed and sworn to before me this ——— day of ———, A. D, 188–.

(Official signature).

NOTE.—For materials insert "goods furnished and delivered to owners of said premises, for use on said premises, and which were used on said premises." Below, substitute "materials furnished, to wit: Powder, lumber, etc., as per bill annexed" in place of "work and labor."

FORM 6.

**Application for Survey.**

——— ———, 188–.

*To* ———, *United States Surveyor-General for* ———:

SIR—In compliance with the provisions of Chapter Six of Title Thirty-two, Revised Statutes of the United States, ——— herewith make application for an official survey of the mining claim known as the ——— mine, claimed by ———, located in ——— Mining District, in the County of ———, Township No. ———, Range No. ———, ——— base and meridian, in the ——— of ———, and ——— request that you will send to ——— address an estimate of the amount to be deposited, for the work to be done in your office; and that after such deposit shall have been made, you will cause the said mining claim to be surveyed by ———, United States Deputy Surveyor at ———.

Respectfully,

——— ———, Claimant.

P. O. Address, ———, ——— county, ———.

NOTE.—Survey is not required when placer-claims embrace legal subdivisions.

FORM 7.

**Application for Patent.**

———, *County of* ———, *ss.*

APPLICATION FOR PATENT FOR THE ——— ——— MINING CLAIM.

*To the Register and Receiver of the U. S. Land Office at* ———.

———, being duly sworn according to law, deposes and says, that in virtue of a compliance with the mining rules, regulations and customs, by himself, the said ———, and his co-claimants (residence of each should be stated), ———, applicants for patent herein ha— become the owner of and ——— in the actual, quiet and undisturbed possession of ——— linear feet of the ——— vein, lode or deposit, bearing ———, together with surface ground ——— feet in width, for the convenient working thereof, as allowed by local rules and customs of miners; said mineral claim, vein, lode or deposit and surface ground being situated in the ——— mining district, county of ———, and ——— of ———, and being more particularly set forth and described in the official field notes of survey thereof, hereto attached, dated ——— day of ———, A. D. 188–, and in the official plat of said survey, now posted conspicuously upon said mining claim or premises, a copy of which is filed herewith. Deponent further states that the facts relative to the right of possession of himself (and his said co-claimants hereinbefore named) to said mining claim, vein, lode or deposit and surface ground, so surveyed and platted, are substantially as follows, to wit:

(*Trace the history of the lode fully.*)

Which will more fully appear by reference to the copy of the original record of location and the abstract of title hereto attached and made a part of this affidavit; the value of the labor done and improvements made upon said ——— claim, by himself and his grantors, being equal to the sum of five hundred dollars, and said improvements consist of (*describe fully*). In consideration of which facts, and in conformity with the provisions of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, application is hereby made for and in behalf of said ——— for a patent from the Government of the United States for the said ——— mining claim, vein, lode, deposit, and the surface ground so officially surveyed and platted.

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–, and I hereby certify that I consider the above deponent a credible and reliable person, and that the foregoing affidavit, to which was attached the field notes of survey of the ——— mining claim, was read and examined by him before his signature was affixed thereto and the oath made by him.

(Official Signature.)

NOTE.—The above is slightly changed in applying for placer-mines.

FORM 8.

**Proof of Posting Notice and Diagram on the Claim.**

——— *of* ———, *County of* ———, *ss.*

——— and ———, each for himself, and not one for the other, being first duly sworn according to law, deposes and says, that he is a citizen of the United States, over the age of twenty-one years, and was present on the ——— day of ———, A. D. 188–, when a plat representing the ———, and certified to as correct by the United States Surveyor-General of ———, and designated by him as lot No. ———, together with a notice of the intention of ——— and ——— to apply for a patent for the mining claim and premises so platted, was posted in a conspicuous place upon said mining claim, to wit: Upon ———, where the same could be easily seen and examined; the notice so conspicuously posted upon said claim being in words and figures as follows, to wit:

NOTICE OF THE APPLICATION OF ——— AND ——— FOR A UNITED STATES PATENT.

Notice is hereby given that in pursuance of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, ——— and ———, claiming ——— linear feet of the ——— vein, lode or mineral deposit, bearing ———, with surface ground ——— feet in width, lying and being situated within the ——— mining district, county of ———, and ——— of ———, ha– made application to the United States for a patent for the said mining claim, which is more fully described as to metes and bounds by the official plat herewith posted and by the field notes of survey thereof, now filed in the office of the Register of the District of Lands, subject to sale at ———, which field notes of survey describe the boundaries and extent of said claim on the surface, with magnetic variation at ——— east, as follows, to wit:

(*Full description by courses and distances.*)

the said mining claim being of record in the office of the Recorder of ———, at ———, in the county and ——— aforesaid, the presumed general course or direction of the said ——— vein, lode or mineral deposit being shown upon the plat posted herewith, as near as can be determined from present developments; this claim being for ——— linear feet thereof, together with the surface ground shown upon the official plat posted herewith, the said vein, lode and mining premises hereby sought to be patented being bounded on the ——— by the ——— mining claim.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted and applied for, are hereby notified that unless their adverse claims are duly filed as according to law and the regulations thereunder within sixty days from the date hereof, with the Register of the United States Land Office at ———, in the ——— of ———, they will be barred, in virtue of the provisions of said statute.

——— ——— (Names of applicants.)

Dated on the ground this ——— day of ———, A. D. 188–.

Witness: (Names of witnesses.) ——— ———. ——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–, and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit and notice were read by each of them before their signatures were affixed thereto and the oath made by them.

——— ———.

NOTE.—The notice to be posted on the claim with the plat is given in the above form.

FORM 9.

**Proof that Plat and Notice Remained Posted on Claim During Period of Publication.**

——— *of* ———, *County of* ———, *ss.*

———,being first duly sworn according to law, deposes and says, that he is claimant (and co-owner with ———) in the ——— mining claim, ——— mining district, ——— county, the official plat of which premises, designated by the Surveyor-General as lot No. ———, together with the notice of intention to apply for a patent therefor, was posted thereon, on the ——— day of ———, A. D. 188–, as fully set forth and described in the affidavit of ——— and ———, dated the ——— day of ———, A. D. 188–, which affidavit was duly filed in the office of the Register at ——— in this case; and that the plat and notice so mentioned and described, remained continuously and conspicuously posted upon said mining claim from the ——— day of ———, A. D. 188–, until and including the ——— day of ——— ———, A. D. 188–, including the sixty days period during which notice of said application for patent was published in the newspaper.

[Jurat.] ——— ———.

(One of the applicants.)

FORM 10.

**Register's Certificate of Posting Notice for Sixty Days.**

United States Land Office, at ———, ———, 188–.

I hereby certify that the official plat of the ——— lode designated by the Surveyor-General as lot No. ——— was filed in this office on the ——— day of ———, A. D. 188–, and that the attached notice of the intention of ——— to apply for a patent for the mining claim or premises embraced by said plat, and described in the field notes of survey thereof filed in said application, was posted conspicuously in this office on the ——— day of ———, A. D. 188–, and remained so posted until the ——— day of ———, A. D. 188–, being the full period of sixty consecutive days during the period of publication as required by law; and that said plat remained in this office during that time, subject to examination, and that no adverse claim thereto has been filed.

——— ———, *Register.*

NOTE.—The notice posted in the office should be attached to this certificate; a copy of the notice published is the one usually posted in the Register's office.

**FORM 11.**

**Notice for Publication in Newspaper.**

*Mining Application No.* ——.

United States Land Office, —— ——, ——, 188–.

Notice is hereby given that ——, whose post office address is ——, has this day filed his application for a patent for —— linear feet of the —— mine or vein bearing ——, with surface ground —— feet in width, situated in —— mining district, county of ——, and —— of ——, and designated by the field notes and official plat on file in this office as lot No. ——, in township ——, range ——, of —— meridian, ——. Said lot No. —— being described as follows, to wit: Beginning at, etc.

Magnetic variation ——, containing —— acres.

The location of this mine is recorded in the Recorder's office of ——, in book —— of ——. The adjoining claimants are ——.

Any and all persons claiming adversely any portion of said —— mine or surface ground are required to file their adverse claims with the Register of the United States Land Office at ——, in the —— of ——, during the sixty days period of publication hereof, or they will be barred by virtue of the provisions of the statute.

—— ——, *Register.*

**FORM 12.**

**Agreement of Publisher.**

The undersigned, publisher and proprietor of the ——, a —— newspaper, published at ——, county of ——, and —— of ——, does hereby agree to publish a notice, dated United States Land Office, ——, required by Chapter Six of Title Thirty-two, Revised Statutes of the United States, of the intention of —— to apply for a patent for his claim on the —— lode, situated in —— mining district, county of ——, of ——, and to hold the said —— alone responsible for the amount due for publishing the same. And it is hereby expressly stipulated and agreed that no claim shall be made against the Government of the United States, or its officers or agents, for such publication.

Witness my hand and seal this —— day of ——, A. D. 188–.

Witness: —— ——.

——.

**FORM 13.**

**Proof of Publication.**

—— *of* ——, *County of* ——, *ss.*

Reprint Copy of } ——, being first duly sworn, deposes and says, that he is
Notice of Application. } the —— of the ——, a newspaper published at ——, in —— county, in the —— of ——; that the notice of the application for a patent for the —— mining claim, of which a copy is hereto attached, was first published in said newspaper, in its issue dated the —— of ——, 188–, and was published in each [daily or weekly] issue of said newspaper for [sixty consecutive days, or nine consecutive weeks,] thereafter, the full period of sixty days, the last publication thereof being in the issue dated the —— of ——, 188–.

—— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 188–.

[SEAL.] —— ——, *Notary Public.*

FORM 14.

**Affidavit of Five Hundred Dollars Improvement.**

——— *of* ———, *County of* ———, *ss.*

——— and ———, of lawful age, being first duly sworn according to law, depose and say that they are acquainted with the ——— mining claim in ——— mining district, county and ——— aforesaid, for which ——— has made application for patent under the provisions of Chapter Six of Title Thirty-two, Revised Statutes of the United States and that the labor done and improvements made thereon by the applicant and his grantors exceed five hundred dollars in value, and said improvements consist of (describe fully).

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–.

——— ———.

FORM 15.

**Statement of Fees and Charges.**

——— *of* ———, *County of* ———, *ss.*

———, being first duly sworn according to law, deposes and says that he is the applicant for patent for the ——— lode in ——— mining district, county of ———, ——— of ———, under the provisions of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, and that in the prosecution of said application he has paid out the following amounts, and no more, viz.: To the credit of the Surveyor-General's office, ——— dollars; for surveying, ——— dollars; for filing in the local land office, ——— dollars; for publication of notice, ——— dollars; and for the land embraced in his claim, ——— dollars.

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–.

[SEAL.] ——— ———, *Notary Public.*

FORM 16.

**Proof of Ownership and Possession in Case of Loss or Absence of Mining Records.**

——— *of* ———, *County of* ———, *ss.*

——— ———, and ——— ———, each for himself, and not one for the other, being first duly sworn according to law, deposes and says that he is a citizen of the United States, over the age of twenty-one years, and a resident of ——— county, ———, and has resided in ——— mining district, wherein the ——— mine is situated, since ——— day of ———, 18—. That since said date he has been acquainted with the ——— mine, and with the possessors and workers thereof. That said mine was located and has been possessed and worked in accordance with the customs and usages of miners in said district, and in conformity with the rules and regulations governing the location, holding and working of mining claims, in force and observed in the (State) of ———. That there are no written records known to deponent existing in said mining district. That affiant is credibly informed and believes that the ——— mine was located in the year 18—, and that if any record was made of said location, and of the names of locators, the same has not been in existence for a long number of years past, and that by reason thereof the names of locators cannot now be ascertained, and no abstract of title from locators to the present owner can be made. That the possession of applicant and his predecessors in interest of said ——— mine has been actual, notorious and continuous, to the positive knowledge of deponent, since his residence in said mining district, and that such possession has been perfected and maintained in conformity with mining usages and customs, and has been acquiesced in and respected

by the miners of said district. That applicant's right to the said ——— mine is not in litigation within the knowledge of affiant, and that no action or actions have been commenced affecting the right to said mine since his acquaintance therewith (and that the time for the commencement thereof, as required to be instituted under the provisions of the Statute of Limitations of the ——— of ———, has long since elapsed). That applicant and his predecessors in interest have expended in the improvement, development and working of said mine a sum of money exceeding ——— dollars, as follows, to wit: ———.

——— ———.
——— ———.
——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–, and I certify that the aforenamed ——— and ——— are credible and respectable persons, to whose affidavits full faith and credit should be given.

[SEAL.] ——— ———.

NOTE.—This should be sworn to by at least two respectable persons.

FORM 17.

**Affidavit of Citizenship.**

——— *of* ———, *County of* ———, *ss.*

———, being first duly sworn according to law, deposes and says, that he is the applicant for patent for ——— mining claim, situated in ——— mining district, county of ———; that he is a native-born citizen of the United States, born in ———, county of ———, State of ———, in the year 18—, and is now a resident of ———.

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–.

——— ———.

NOTE.—If the applicant is a naturalized citizen, or has declared his intention to become a citizen, he should show in his affidavit where, when and before what court he was naturalized or his declaration was made.

FORM 18.

**Certificate that No Suit is Pending.**

——— *of* ———, *County of* ———, *ss.*

I, ———, clerk of the court in and for ——— county, ———, do hereby certify that there is now no suit or action of any character pending in said court involving the right of possession to any portion of ——— mining claim, and that there has been no litigation before said court affecting the title to said claim, or any part thereof, for ——— years last past, other than what has been finally decided in favor of ———.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in ———, this ——— day of ———, A. D. 188–.

[SEAL.] ——— ———, Clerk of the ——— Court, ———.

FORM 19.

**Power of Attorney to Apply for Patent.**

KNOW ALL MEN BY THESE PRESENTS, that we, ——— and ———, do hereby constitute and appoint ——— as our attorney in fact, for us and in our names, to make application to the United States for the entry and purchase of certain Government lands in ——— mining district, ——— county, ——— of ———, known as the ——— mining claim and premises; and to have the same surveyed, and to take any and all steps that may be necessary to procure from the Government of the United States a patent to

the said lands and premises, granting the same to us. And to do all other acts appertaining to the said survey and entry aforesaid as we ourselves could do by our own act and in our own proper person.

In witness whereof we have hereunto set our hands and affixed our seals the ——— day of ———, A. D. 188–.

——— ———.
——— ———.

——— *of* ———, *County of* ———, *ss.*

On this ——— day of ———, A. D. 188–, before me, ———, a Notary Public in and for the ———, county of ———, personally appeared ———, known to me to be the same person whose name ——— subscribed to the foregoing instrument, and acknowledged to me that ——— executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal at my office, the day and year in this certificate first above written.

[SEAL.] ——— ———, *Notary Public.*

FORM 20.

**Proof that no Known Vein Exists in a Placer Mining Claim.**

——— *of* ———, *County of* ———, *ss.*

——— and ———, of the said county and ———, being first duly sworn, each for himself, deposes and says, that he is well acquainted with the ——— placer mining claim, embracing ——— ———, situated in the ——— mining district, in the county of ———, and ——— of ———, owned and worked by ———, applicant for United States patent; that for many years he has resided near, and often been upon the said mining premises, and that no known vein or veins of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, exist on said mining claim, or on any part thereof, so far as he knows, and he verily believes that none exist thereon. And further, that he has no interest whatever in the said placer-mine of ———.

———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–.

———.

NOTE.—In case any known mines exist within the exterior boundaries of the placer-claim, the names of such known veins should be given.

FORM 21.

**Protest and Adverse Claim.**

United States Land Office, ——— of ———.

In the matter of the application of ———, for a United States patent for the ——— lode or mining claim and the land and premises appertaining to said mine, situated in the ——— mining district, in ——— county, ——— of ———.

*To the Register and Receiver of the United States Land Office at* ———, *and to the above-named applicants for patent for the* ——— *lode.*

You are hereby notified that ——— of the city of ———, county of ———, and ——— of ———, and a citizen of the United States of America, is the lawful owner, and entitled to the possession of ——— hundred feet of the said ——— lode or mine described in said application, as shown by the diagram posted on said claim, and the copy thereof filed in the land office with said application, and as such owner this contestant, the said ———, does protest against the issuing of a patent thereon to said applicant, and does dispute and contest the right of said applicant therefor.

And this contestant does present the nature of his adverse claim, and does fully set forth the same in the affidavit hereto attached, marked Exhibit A, and the further exhibits thereto attached, and made part of said affidavit.

The said ——— therefore respectfully asks the said Register and Receiver that all further proceedings in the matter be stayed, until a final settlement and adjudication of the rights of this contestant can be had in a court of competent jurisdiction.

(Place and Date.) ——— ———.

EXHIBIT A.

——— *of* ———, *County of* ———, *ss.*

———, being first duly sworn, deposes and says, that he is a citizen of the United States, born in the State of ———, and is now residing in ———; that he is the contestant and protestant named in, and who subscribed the notice and protest hereto annexed. Affiant further says that he is the owner by purchase and in the possession of the (adverse) lode or vein of quartz and other rock in place, bearing ——— and other metals. That the said lode is situated in the ——— mining district, ——— county, ——— of ———.

[*The history of the lode should be given in full; for instance, as follows:*]

This affiant further says, that on the day of location the premises hereinafter described were mineral lands of the public domain, and entirely vacant and unoccupied, and were not owned, held, or claimed by any person or persons as mining ground or otherwise, and that while the same were so vacant and unoccupied, and unclaimed, to wit:

On the ——— ——— day of ——— ———, 18—, (name locators,) each and all of them being citizens of the United States, entered upon and explored the premises, discovered and located the said ——— ——— lode, and occupied the same as mining claims. That the said premises so located and appropriated consist of ——— ——— feet in a ———erly direction, and ——— ——— ——— feet in a ———erly direction, as will fully appear by reference to the notice of location, a duly certified copy whereof is hereunto annexed, marked Exhibit B, and hereby made a part of this affidavit. That the locators, after the discovery of the said ——— lode, drove a stake on said lode on the discovery claim, erected a monument of stone around said stake, and placed thereon a written notice of location describing the claim so located and appropriated, giving the names of the locators and quantity taken by each, and after doing all the acts and performing all the labor required by the laws and regulations of said ——— mining district and territory of ———, the locators of said lode caused said notice to be filed and recorded in the proper books of record in the Recorder's office in said district on the ——— day of ———, 18—.

Affiant further says, that the said locators remained continuously in possession of said lode, working upon the same, and within ——— months from the date of said location had done and performed work and labor on said location in mining thereon and developing the same, more than ——— days work, and expended on said location more than ———hundred dollars, and by said labor and money expended upon the said mining location and claim, had developed the same and extracted therefrom more than ——— tons of ore.

And affiant further says, that said locators, in all respects, complied with every custom, rule, regulation, and requirement of the mining laws, and every rule and custom established and in force in said ——— mining district, and thereby became and were owners (except as against the paramount title of the United States) and the rightful possessors of said mining claims and premises.

And this affiant further says, that said locators proved and established to the satisfaction of the Recorder of said ——— mining district that they had fully complied with all the rules, customs, regulations, and requirements of the laws of said district, and thereupon the said Recorder issued to the locators of said ——— lode, certificates confirming their titles and rights to said premises.

That the said lode was located and worked by the said locators as tenants in common, and they so continued in the rightful and undisputed possession thereof from the time of said location until on or about the ——— day of ———, A. D. 18—, at which time the said locators and owners of said lode formed and organized under the laws of the State (or Territory) of ———, and incorporated under the name of the "———," and on the ——— day of ———, A. D. 18—, each of the locators of said lode conveyed said lode and each of their rights, titles, and interest in and to said lode, to said "——— mining company."

On the said ——— day of ———, 18—, the said company entered into and upon said ——— lode, and was seized and possessed thereof and every part and parcel of the same, and occupied and mined thereon until the ——— day of ———, 18—, at which time the said ——— mining company sold and conveyed the same to this affiant, which said several transfers and conveyances will fully appear, by reference to the abstract of title and paper hereto attached, marked Exhibit D, and made a part of this affidavit.

[*In case of individual transfers.*]

And this affiant further says, that the said ———, who located claim ——— north westerly of the said ——— lode, and the said ———, who located claim ——— north-westerly thereon, was seized and in possession of said claims, and occupied and mined thereon until the ——— day of ———, 18—, at which time the said ——— and ——— sold and conveyed the same to ———, and thereupon the said ——— was seized and possessed of said mining claims and locations, and occupied and mined thereon until the ——— day of ———, 18—, at which time the said ——— sold and conveyed the same to this affiant, as will fully appear by reference to the abstract of title and paper hereto attached, marked Exhibit D, and which this affiant hereby makes a part of this his affidavit.

Affiant further says, that he is now and has been in the occupation and possession of the said ——— lode since the ——— day of ———, 18—, and that said lode and mining claims were located, and the title thereto established, several ——— before said (applied for) ——— lode was located.

Affiant further says, that said ——— lode, as shown by the notice and diagram posted on said claim, and the copy thereof filed in the United States Land Office at said ——— with said application for a patent, crosses and overlaps said ——— lode, and embraces about ——— hundred feet in length by ——— hundred feet in width of the said ——— lode, the property of this affiant, as fully appears by reference to the diagram or map duly certified by ———, United States Deputy Surveyor, hereto attached, marked Exhibit C, and which diagram presents a correct description of the relative locations of the said (adverse) lode, and of the pretended (applied for) lode.

Affiant further says, that he is informed and believes that said applicant for patent well knew that affiant was the owner in possession and entitled to the possession of so much of said mining ground embraced within the survey and diagram of said applications, as is hereinbefore stated, and that this affiant is entitled to all the ———and other metal in said (adverse) lode, and all that may be contained within a space of ——— feet on each side of said (adverse) lode.

And affiant further says, that this protest is made in entire good faith, and with the sole object of protecting the legal rights and property of this affiant in the said (adverse) lode and mining premises.

——— ———.

Subscribed and sworn to before me this ——— day of ———, A. D. 188–.

——— ———.

SURVEYOR'S CERTIFICATE.

On the diagram marked Exhibit C, the Surveyor must certify in effect, as follows:

I hereby certify that the above diagram correctly represents the conflict claimed to exist between the ——— and ——— lodes, as actually surveyed by me. And I further certify, that the value of the labor and improvements on the (adverse) lode, exceeds five hundred dollars, and said improvements consist of (state in full).

(Place and Date.)

——— ———, *U. S. Deputy Surveyor.*

FORM 22.*

**Tunnel Claim—Location Certificate.**

Know all men by these presents, that the undersigned, citizens of the United States, have this ——— day of ———, 188–, claimed by right of location, a tunnel claim, for the purpose of discovering and working veins, lodes or deposits on the line thereof [cutting the ——— lode, and working the ——— lode]. Said tunnel claim is situated in the ——— mining district, county of ———, State of ———, and the location and bounds of said tunnel are staked on the surface at the place of commencement and termination thereof, as well as along the line thereof. Said claim is more particularly described as follows: [*Describe the commencement and termination by reference to natural objects and permanent monuments, and the line by courses and distances.*]

Dated ———, 188–.

——— ———,
*Locator.*

FORM 23.

**Power of Attorney to Locate and Sell.**

Know all men by these presents, that we, the undersigned [*names*], ———, citizens of the United States, have made, constituted and appointed A. B. [*some third person, who will locate and stake*], our true and lawful attorney for us, and in our names to locate, stake and record for us each lode claims and placer mining ground in the ———, ——— county, ——— of ———, and having located the same, to bargain, sell, grant, release and convey the same, entire or in separate parcels, to make proper deeds, seal, acknowledge and deliver the same to such persons as our attorney may desire; hereby ratifying and confirming all lawful acts done by our said attorney by virtue hereof.

Witness our hands and seals, this ——— day of ———, 18—.

[*Names.*]

——— *of* ———, *County of* ———, *ss.*

On this ——— day of ———, 18—, before me ——— in and for the county and State aforesaid, appeared ——— personally known to me as the persons whose names are subscribed to the foregoing power of attorney, and acknowledged the execution thereof as their free act and deed, for the purposes therein mentioned.

Given under my hand and ——— seal the day and year above written.

——— ———.

FORM 24.

**Notice of Right to Water.**

The undersigned claims the water running in this ——— stream to the extent of ——— inches for mining purposes, to be conveyed by (ditch or flume) from this point to the ——— placer claim.

Dated ———, 18—.

——— ———,
*Locator.*

NOTE—This notice is to be posted near the outlet, and the following form is to be duly recorded in the district or county Recorder's office.

* Forms 22, 23, 24, 25, 26, 27, and 28, are from Carpenter's Mining Code, slightly modified.

FORM 25.

**Pre-emption of Right of Way for Ditch and Location of Water.**

To whom these presents may concern, know ye, that I, ———, of the county of ———, in the State of ———, a citizen of the United States, do hereby declare and publish as a legal notice to all the world, that I claim, and have a valid right to the occupation, possession and enjoyment of all and singular, that tract or parcel of land lying and being in the county of ———, in the State of ———, for the exclusive right of way for the purpose of constructing a flume or water ditch from ——— stream to ——— placer claim, more particularly described as follows: Commencing [*here describe the exact route for ditch or flume.*]

I also claim, and have a valid right to the enjoyment and use of ——— inches of water from said stream for mining purposes, to be conveyed through such flume or water ditch to said claim, together with all and singular, the hereditaments and appurtenances thereunto belonging, or in any wise appertaining.

Witness my hand and seal this ——— day of ———, A. D. 18—.

——— ———.

[*Name.*]

Notice posted on the stream ———, 18—.

Ditch commenced at claim or at stream ———, 18—.

——— *of* ———, *County of* ———, *ss.*

On this ——— day of ———, 18—, before me, a ——— in and for the county aforesaid, in the State aforesaid, personally appeared ———, to me personally known to be the person who executed the foregoing written instrument, and acknowledged that he executed the same for the uses and purposes therein set forth.

Witness my hand and official seal. ——— ———.

FORM 26.

**Mining Deed.**

THIS INDENTURE, made the ——— day of ———, in the year of our Lord one thousand eight hundred and eighty, between ——— ———, of the county of ———, and ——— of ———, party of the first, and ——— ———, of the county of ———, and ——— of ———, party of the second part;

*Witnesseth*, That the said party of the first part, for and in consideration of the sum of ——— dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, released, and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release, and forever quit-claim, unto the said party of the second part, his heirs and assigns, the ——— lode, as located, surveyed, recorded, and held by said party of the first part, situated in ——— mining district, ——— county, ———, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the rents, issues, and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

*To have and to hold*, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs

and assigns forever. In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

[SEAL.] ——— ———.

——— *of* ———, ——— *County, ss.*

I, Richard Roe, a Notary Public in and for said county, in the State aforesaid, do hereby certify that ——— ———, personally known to me to be the person whose name is subscribed to the annexed deed, appeared before me this day in person, and acknowledged that he signed, sealed and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and official seal, this ——— day of ———, A. D. 188–.

[SEAL.] RICHARD ROE, *Notary Public.*

FORM 27.

**Title Bond to Mining Property.**

Know all men by these presents, that I, John W. Newton, party of the first part, of the county of Lake, and State of Colorado, am held and firmly bound unto William H. Hunt, party of the second part, of the county of Lake, and State of Colorado, in the penal sum of ten thousand dollars, lawful money of the United States, to the payment of which the party of the first part hereby binds himself, his heirs, executors, and administrators. Witness his hand and seal this 20th day of July, 1880. The conditions of the foregoing obligations are such, that whereas, the above bounden party of the first part, in consideration of the sum of five dollars, in hand paid, has, on the day and year aforesaid, agreed to sell to the party of the second part the following described mining property, viz: An undivided one-eighth interest in and to the Gilt Edge lode claim, as located, surveyed, recorded, and held, situate, lying and being in California Mining District, Lake county, Colorado, together with all and singular, the improvements, hereditaments, and appurtenances thereto belonging, or in any wise appertaining, for the sum of five thousand dollars, to be paid at the times and in the manner following, viz: One thousand dollars on or before August 20, 1880; one thousand dollars on or before September 20, 1880; and three thousand dollars on or before October 20, 1880; which sums of money are to be paid to the party of the first part, in person, or by depositing the same to his credit at the Vermont National Bank of St. Albans, at the times aforesaid, and time shall be of the essence of these conditions. And in case of failure of the party of the second part, or his assigns, to make either of said payments at the times mentioned, such sum or sums as may have been paid hereunder, shall be forfeited to and retained by the party of the first part, as a penalty and for liquidated damages, and notice of forfeiture is hereby expressly waived, and also all right, demand or claim for the balance or any of said sum of five thousand dollars, is hereby expressly waived by the party of the first part. The party of the first part, his heirs, executors, administrators, and assigns, shall on the 20th day of October, 1880, or at any time before, upon payment of said sums of money hereinbefore mentioned, make, execute, and deliver to the party of the second part, or to such person or persons as he shall designate, good and sufficient deed or deeds of all of the above described property, conveying a clear and perfect title (except the fee simple title of the United States), free from all incumbrances, with a covenant, that the annual expenditure has been made thereon as required by law. Now, if the party of the second part shall fail to pay the sum or sums of money as hereinbefore provided, and if the party of the first part shall faithfully perform the covenants herein set forth, then this obligation shall be null and void; otherwise, to be and remain in full force and effect.

[SEAL.] JOHN W. NEWTON.

*State of Colorado, Lake county, ss.*

*Be it known,* That on this 20th day of July, 1880, before me, personally came John

W. Newton, to me known as the person described in, and who executed the foregoing instrument in writing, and acknowledged the execution thereof to be his free act and deed, for the uses and purposes therein mentioned.

Witness my hand and official seal.

[SEAL.] ALEX. G. WATSON, *Notary Public.*

FORM 28.

**Escrow Agreement.**

The inclosed deed of the ——— lode is hereby placed in the ——— Bank of ———, *in escrow.* If A. B. shall place, or cause to be placed to the credit of C. D. and E. F., in said ——— bank of ———, on or before ———, 188–, the full sum of ——— dollars, then and in that case the said bank is hereby authorized to deliver the inclosed deed to A. B., or his order. In case the said A. B. shall not place, or cause to be placed, to the credit of said C. D. and E. F., in said bank, the full sum of ——— dollars, on or before ———, 188–, then the said bank is hereby authorized to deliver the inclosed deed to the said C. D. and E. F., or their joint order.

(Signed) C. D.
E. F.
A. B.

——— ——— ———, 188–, (Place and date).

NOTE.—When the option for the purchase of a mine is desired by a third party, it is the safest and best plan for the mine owner to put a deed *in escrow.* It saves incumbering of the record, and any questions that might arise concerning the payment of money. The deed should be a warranty, quit-claim, or mining deed, as agreed, fully executed and acknowledged, ready for delivery, put in a sealed envelope, and placed in some bank, or left with some responsible person, with an agreement written upon the envelope, as above.

FORM 29.

**Mining Lease.***

THIS INDENTURE, made this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty ——, between ——— lessor and ——— lessee or tenant; *Witnesseth,* That the said lessor for and in consideration of the rents, royalties, covenants and agreements hereinafter reserved, and by the said lessee to be paid, kept and performed, ——— granted, demised and let, and by these presents do grant, demise and let unto the said lessee, all the following described mine and mining property, situated in ——— mining district, county of ———, ——— of ———, to wit: (Here description of property.) Together with the appurtenances ——— to have and to hold unto the said lessee or tenant for the term of ——— from the date hereof, expiring at noon on the ——— day of ———, A. D. 188–, unless sooner forfeited or determined through the violation of any covenant hereinafter against the said tenant ——— reserved.

And in consideration of the said demise, the said lessee does covenant and agree with said lessor as follows, to wit:

To enter upon said mine or premises and work the same mine fashion, in manner necessary to good and economical mining, so as to take out the greatest amount of ore possible, with due regard to the safety, development and preservation of the said premises as a workable mine.

(Here insert special covenants for dead work, etc.)

* From Morrison's Mining Rights in Colorado.

NOTE.—The covenants of a mining lease are peculiar, and cannot be too particularly stated in the instrument. If for more than one year, it should be in writing, and recorded.

Instead of a lease a license may be granted. The distinctions between a lease and a license are technical, but important.

A license, usually, is not exclusive, and invests no property in the mineral until severed. Work done for lessees cannot subject the ground to a miner's lien.

To work and mine said premises as aforesaid steadily and continuously from the date of this lease: and that any failure to work said premises with at least ——— persons employed underground for the space of ——— consecutive days may be considered a violation of this covenant.

To well and sufficiently timber said mine at all points where proper, in accordance with good mining; and to repair all old timbering wherever it may become necessary.

To allow said lessor and ——— agents to enter upon and into all parts of said mine for the purpose of inspection, with use of all passages, ropes, windlass, ladder-ways, and all other means of ingress and egress for such purpose.

To not assign this lease, or any interest thereunder, and to not sublet the said premises or any part thereof, without the written assent of said lessor, and to not allow any person or persons except the said lessee and ——— workmen to take or hold possession of said premises or any part thereof under any pretence whatever.

To occupy and hold all cross or parallel lodes, dips, spurs, feeders, crevices or mineral deposits of any kind, which may be discovered in working under this lease, or in any tunnel run to intersect said ——— lode, or by the said lessee or any person or persons under ———, in any manner at any point within ——— feet of the centre line of said lode, as the property of said lessor; with privilege to said lessee of working the same as an appurtenance of said demised premises, during the term of this lease; and to not locate or record the same, or allow the same to be located or recorded, except in the name of said lessor.

To keep at all times the drifts, shafts, tunnels, and other passages and workings of said demised premises, thoroughly drained and clear of loose rock and rubbish of all kinds.

To pay and deliver to said lessor as royalty, ——— of all ore to be extracted from said premises during said term, of like assay to that retained by said lessee, delivered at ——— as soon as mined, without offset, deduction, or charge whatever, except lessor's proportion for packing.

To deliver up to said lessor the said premises, with the appurtenances and all improvements ——— in good order and condition, with all shafts and tunnels and other passages thoroughly clear of rubbish and drained, and the mine in all points ready for immediate continued working (accidents not arising from negligence alone excusing), without demand or further notice, on said ——— day of ———, A. D. 188–, at noon or at any time previous, upon demand for forfeiture.

And finally, upon the violation by said lessee, or any person under ———, of any covenant or covenants hereinbefore reserved, the term of this lease shall, at the option of said lessor, expire, and the same and said premises with the appurtenances shall become forfeit to said lessor: and said lessor or ——— agent may thereupon, after demand of possession in writing, enter upon said premises and dispossess all persons occupying the same, with or without force, and with or without process of law; or at the option of said lessor, the said tenant and all persons found in occupation may be proceeded against as trespassers from the beginning of said term both as to realty and the ore served therefrom; or as guilty of unlawful detainer.

Each and every clause and covenant of this Indenture shall extend to the heirs, executors, and administrators of all parties hereto: and to the assigns of said lessor: and as said lessor may elect, to the assigns of said lessee.

*In witness whereof*, The said parties, lessor and lessee, have hereunto set their hands and seals.

——— ———. ——— ———. [SEAL.]

——— ———. ——— ———. [SEAL.]

FORM 30.

**Incorporation and By-Laws.**

*Certificate of Incorporation of Chrysolite Silver Mining Company.*

*State of New York, City and County of New York, ss.:*

We, Horace A. W. Tabor, Drake De Kay and Henry C. Gardiner, citizens of the United States, and a majority of whom are citizens of the State of New York, hereby associate together for the purpose of creating a corporation under the laws of the State of New York, authorizing the formation of corporations for mining and other purposes, and in compliance with the provisions of said laws we do hereby state and certify:

*First.* That the corporate name of this company is and shall be the CHRYSOLITE SILVER MINING COMPANY.

*Second.* That this company is formed for the sole purpose of mining the ores and minerals contained in the mines known as the Chrysolite, Carboniferous, Little Eva, Vulture, Kit Carson, All Right, Fairview, Pandora, Colorado Chief, Solid Muldoon, Sliver and Eaton, and no others, situated in the California Mining District, Lake County, State of Colorado, and separating the metals from such ores and minerals. The said company shall have power to purchase the said mines, to wit: The said Chrysolite, Carboniferous, Little Eva, Vulture, Kit Carson, All Right, Fairview, Pandora, Colorado Chief, Solid Muldoon, Sliver and Eaton, and to issue full-paid stock in payment therefor.

*Third.* That the amount of capital stock of this company is and shall be ten million dollars, divided into two hundred thousand shares of the par value of fifty dollars each.

*Fourth.* That the existence of the company shall continue for the term of fifty years.

*Fifth.* That the number of trustees who shall manage the concerns and business affairs of said company is and shall be eleven, and John P. Jones, Daniel S. Appleton, Ulysses S. Grant, Junior, Henry A. V. Post, William Borden, Horace A. W. Tabor, William S. Nichols, Leonidas M. Lawson, Edward B. Dorsey, Arthur Sewell, and Charles A. Whittier, are the names of the persons who shall be the trustees of said company for the first year, and all of whom are citizens of the United States, and a majority citizens and residents of the State of New York.

*Sixth.* That the principal office and place of business of said company shall and is to be located in the City and County of New York, State of New York; but the mining operations and the separation of the metals from the ores are to be carried on out of the State of New York, viz.: In the County of Lake, State of Colorado, and elsewhere in said State.

*In witness whereof* we have hereto set our hands and seals this twenty-ninth day of September, one thousand eight hundred and seventy-nine.

| | | |
|---|---|---|
| (Signed,) | H. A. W. TABOR, | [SEAL.] |
| | DRAKE DE KAY, | [SEAL.] |
| | HENRY C. GARDINER. | [SEAL.] |

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*State of New York, City and County of New York, ss.:*

On this 30th day of September, 1879, before me personally came Horace A. W. Tabor, Drake De Kay and Henry C. Gardiner, to me known, and known to me to be the individuals described in and who executed the foregoing certificate, and severally acknowledged that they executed the same for the uses and purposes therein mentioned.

(Signed,) WILLIAM H. CLARKSON,

[SEAL.] *Notary Public for New York County, N. Y.*

*State of New York, City and County of New York, ss.:*

I, Hubert O. Thompson, Clerk of the said City and County, and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original certificate of incorporation of the Chrysolite Silver Mining Company on file in my office, and that the same is a correct transcript therefrom, and of the whole of said original, endorsed, filed 3d October, 1879.

*In witness whereof* I have hereunto subscribed my name and affixed my official seal this 3d day of October, 1879.

(Signed,) HUBERT O. THOMPSON, *Clerk.*

[SEAL.]

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*State of New York, Office of the Secretary of State, ss.:*

I have compared the preceding with the original Certificate of Incorporation of the Chrysolite Silver Mining Company, with acknowledgement thereto annexed, filed in this office on the 3d day of October, 1879, and do hereby certify the same to be a correct transcript therefrom, and of the whole of said original.

*Witness* my hand and seal of office of the Secretary of State, at the City of Albany, this third day of October, one thousand eight hundred and seventy-nine.

(Signed,) GEORGE MOSS,

[SEAL.] *Deputy Secretary of State.*

## BY-LAWS.

### ARTICLE I.

*Officers.*

SECTION 1. The officers of this company shall consist of a President, Vice President, Treasurer, Secretary, General Manager, and Financial Agent. The President and Vice President must be chosen from the Trustees.

### ARTICLE II.

*President.*

SECTION 1. The President shall be the chief executive agent of the company in the management of its affairs, but subject at all times and in all matters to the control and direction of the Board of Trustees. He shall, when present, preside at all meetings of the Board of Trustees, and perform such other duties as may be required of him by the laws of this State, and by the By-Laws of the company, and by the Board of Trustees. He shall sign all contracts, certificates of stock, drafts, acceptances and checks.

SEC. 2. He shall receive such salary as the Board of Trustees may fix and allow.

SEC. 3. He may be removed at any time by a majority of the Board of Trustees.

### ARTICLE III.

*Vice President.*

SECTION 1. In the absence of the President, the Vice President shall possess all the powers and perform all the duties of the President, and receive such compensation for his services as the Board may fix and allow.

### ARTICLE IV.

*Treasurer.*

SECTION 1. It shall be the duty of the Treasurer to receive all the money and funds of the company, and deposit the same in such banking-house as the Board of Trustees shall from time to time direct; and, under the direction of said Board, he shall pay out the same by check, countersigned by the President and Secretary, and not otherwise.

SEC. 2. He shall keep full and correct books of account, which shall at all times be

open to the inspection of any member of the Board. He shall make a report in detail to said Board at least quarterly, and make such other reports and statements at such times as said Board may require.

He shall give such bonds as the Board shall require.

SEC. 3. He shall be entitled to such compensation for his services as the Board of Trustees may from time to time fix and allow.

ARTICLE V.

*Secretary.*

SECTION 1. It shall be the duty of the Secretary to keep full and accurate minutes of all proceedings of the Board of Trustees and Executive Committee, and of the Stockholders, in a proper book or books. He shall also keep a list of all persons who are or have been Stockholders within the period of one year, with their names alphabetically arranged.

SEC. 2. He shall perform such other duties as may be required by the laws of the State, the Board of Trustees, and the By-Laws of the company; and he shall receive such salary as the Board of Trustees may fix and allow.

ARTICLE VI.

*General Manager.*

SECTION 1. The General Manager shall be the general agent of the company in the State of Colorado. He shall have power to enter upon and take possession of all the mines and property of the company in the State of Colorado.

SEC. 2. The General Manager shall be subject at all times and in all matters, acts and transactions, to the direction and control of the President of the company and of the Board of Trustees.

SEC. 3. He shall not have the power to contract any debt or incur any liability on the part of the company exceeding at any time ten thousand dollars in the aggregate, unless previously authorized by the Board of Trustees.

SEC. 4. He shall be subject to suspension at any time at the will of the President, and to removal by the Board of Trustees; and in case of suspension by the President, the President shall forthwith notify the Trustees of such suspension, and call a meeting of the Board.

SEC. 5. The General Manager shall receive such compensation for his services as the Board of Trustees may from time to time fix and allow.

ARTICLE VII.

*Trustees.*

SECTION 1. Regular meetings of the Board of Trustees shall be held at the office of the company on the fifteenth day of each and every month. When this falls on a legal holiday, on the next succeeding day that is not a legal holiday.

SEC. 2. Special meetings of the Board may be held at any time on notice of two days, by mail or personal service, to each member of said Board, stating the time, place and objects of meeting, to be given by the President or by the Secretary at the request of any two members of the Board, and no business except that so stated can be acted on at such meeting.

SEC. 3. They shall exercise a general supervision over the affairs of the company, receive and pass upon the reports of the Secretary, Treasurer and Superintendent, declare dividends, audit all bills and accounts against the company, and direct the Secretary in correspondence. They shall have power to delegate from time to time such authority as they may deem necessary to the officers or agents of the company, or to any one or

more members acting as a committee. They may appoint a managing director or such other agents as they may deem necessary, define their respective duties, fix their compensation, and remove or suspend them for sufficient cause, except for the removal of the President and amendment of the By-Laws; in this case a majority.

SEC. 4. Five of the Trustees shall constitute a quorum of the Board at any regular or special meeting; but, in the absence of a majority of the Board, the minority shall have power to adjourn such meeting, regular or special.

In case of meetings held for the amendment of the By-Laws or the removal of the President, a majority of the Trustees elected shall be necessary to constitute a quorum.

SEC. 5. Neither the President nor any other officer or agent of this company shall have power to contract any debt or incur any liability exceeding the sum of ten thousand dollars, without the authority of the Board of Trustees or the Executive Committee.

ARTICLE VIII.

*Executive Committee.*

SECTION 1. There shall be an Executive Committee, consisting of five Trustees, four of whom shall be appointed by resolution of the Board. The President, or in his absence the Vice President, shall act as the fifth member of such committee.

SEC. 2. The Executive Committee shall have full power to manage all the business affairs of the company when the Board is not in session, and the acts and proceedings of the said committee shall have the same force and effect as the acts and proceedings of the Board of Trustees, unless the action of said committee shall be disapproved by resolution adopted by the Board at the next meeting of the Board held after such act or proceeding of said committee has been reported to the Board of Trustees.

SEC. 3. Any officer or employee of the company, excepting the President, may be suspended or removed at will by the Executive Committee.

ARTICLE IX.

*Vacancy and Tenure.*

SECTION 1. In case of a vacancy occurring from any cause in the Board of Trustees, the same may be filled by appointment made by the Trustees in office.

SEC. 2. The Trustees, and each and every officer of the company, shall hold office until their or his successors shall have been elected or appointed and have qualified; but nothing in this section shall be so construed as to prevent the removal of any officer as hereinbefore provided.

ARTICLE X.

*Certificates.*

SECTION 1. The capital stock of this company shall be represented by certificates signed by the President and the Secretary.

ARTICLE XI.

*Seal.*

SECTION 1. The corporate seal shall bear upon its face, within a circle, the corporate name of the company and date of incorporation.

ARTICLE XII.

*Closing of Books.*

SECTION 1. The stock books of the company shall be closed for five days previous to any election of Trustees or the date of payment of a dividend; and a list of stockholders prepared at that time shall designate who shall vote or receive dividends.

ARTICLE XIII.

*Stockholders' Meeting.*

SECTION 1. The annual meeting of the Stockholders for the election of Trustees of this company shall be held in the city of New York on the first Tuesday in October, 1880, and yearly thereafter. Twenty days notice shall be given of the time and place of holding such meeting by the Secretary, by public advertisement in one or more daily newspapers published in the city of New York, and by notice sent by mail to each Stockholder at his residence, as it may appear on the books of the company. A majority of the Stockholders present, either in person or by attorney, shall constitute a quorum.

SEC. 2. At such election each Stockholder shall be entitled to cast one vote for each share standing in his name, as shall appear by stock list at the time of closing the books. No person shall vote as proxy unless he shall produce and deliver to the Secretary a written authority so to do, signed by the Stockholder whom he represents.

SEC. 3. The polls shall be open at twelve o'clock noon, and shall remain open until two o'clock in the afternoon of the same day, and on the closing thereof the inspectors shall proceed to count the vote and declare the result.

ARTICLE XIV.

*Amendments.*

SECTION 1. These By-Laws may be altered, amended or repealed by the Board of Trustees, at any regular or special meeting; but in every or any such alteration, amendment or repeal at least a majority of the members of the Board of Trustees must concur.

FORM 31.

**Stock Certificate.**

100 SHARES.

*Shares $50 each.* Countersigned and registered ——, 188–. *Registrar of Transfers.*

*Location of mine.* } FRYER HILL. LEADVILLE, COLORADO.

CHRYSOLITE SILVER (*Picture*) MINING COMPANY.

*Number* 5195. 100 *Shares.*

This certifies that —— —— is entitled to One Hundred Shares of the Full-paid Capital Stock of the Chrysolite Silver Mining Company, transferable only on the books of the Company, in person or by attorney, on surrender of this Certificate. This Certificate is not valid without the signature of the Registrar of Transfers.

*Capital $10,000,000.*

*New York,* —— ——, *President.*

——, 188–. —— ——, *Secretary.*

200,000 Shares.

100.

*Organized under the Laws of the State of New York.*

*Transfer on Back.*

For value received — have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer unto —— —— the Capital Stock named in the within Certificate, and — do hereby constitute and appoint —— —— true and lawful attorney, irrevocable for ——, and in —— name and stead, but to —— use, to sell, assign, transfer and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power. Dated ——, 188–.

—— ——.

Signed and acknowledged in presence of

—— ——.

FORM 32.

**Sketch of Minutes of a First Meeting.**

The Trustees of the ——— met at ———.

The Certificate of Incorporation read.

Election of President, Vice President and Secretary.

Adoption of By-Laws.

Resolution offering the Capital Stock for subscription.

Resolution to purchase certain mining property for a certain amount of full-paid stock, or to accept the property in lieu of money in payment of the subscription to the stock, made by the owners of the property, and authorizing the issue of stock certificates.

Appointment of other officers.

Adoption of a seal, or authorization of the procurement of a suitable seal by the proper officers of the company.

Adoption of a form of stock certificate, or authorization of the preparation of a suitable form by the proper officers of the company.

## *b.* GLOSSARY OF MINING TERMS.*

BY R. W. RAYMOND, PH. D.

*Adit.* A nearly horizontal passage from the surface, by which a mine is entered and unwatered. In the United States an adit is usually called a *tunnel*, though the latter, strictly speaking, passes entirely through a hill, and is open at both ends.

*Adlings*, ENG. Earnings.

*Adobe*, SP. Clay suitable for *adobes* or sun-dried bricks.

*Adventurers*, ENG. Shareholders or partners in a mining enterprise; in Cornwall, *cost-book* partners.

*After-damp*, ENG. The irrespirable gas, consisting of nitrogen and carbonic acid chiefly, remaining after an explosion of *fire-damp*.

*Agitator*, PAC. See *Settler*.

*Air-head or Air-heading*, S. STAFF. A smaller passage, driven parallel with the *gate-road*, and near its roof, to carry the ventilating current. It is connected with the *gate-road* at intervals by openings called *spouts*.

*Aitch-piece*. See *H-piece*.

*Alligator*. A rock-breaker operating by jaws

*Alloy*. A compound of two or more metals fused together.

*Alluvium*. The earthy deposit made by running streams, especially in times of flood.

*Aluminium Ores*. *Cryolite*, a fluoride of sodium and aluminium, found in Greenland; *bauxite*, a hydrous compound of alumina, ferric oxide, and silica.

*Amalgamation*. 1. The production of an amalgam or alloy of mercury. 2. The process in which gold and silver are extracted from pulverized ores by producing an amalgam, from which the mercury is afterwards expelled. See *Retorting*.

*Amalgamator*. 1. A machine for amalgamating ores. 2. The workmen in charge of such a machine.

* NOTE.—This glossary is condensed by the omission of many metallurgical terms, from one prepared by Dr. Raymond (No. 17 Burling Slip, New York City,) with the assistance of other members of the American Institute of Mining Engineers, and presented as a paper to that society.

It is prepared in accordance with the following general principles:

1. To include the most important technical words and phrases used by American miners or occurring in English books and periodicals.

2. To exclude Spanish, French and German terms, unless they fall under the rule above given. The Spanish terms included are in use among our miners in the far West and Southwest.

3. To exclude almost all purely scientific terms, such as those which denote the operations of chemical analysis, the chemical names and symbols of elements and compounds, the species of rocks and minerals, the principles of general physics and mechanics, etc.

4. To avoid scientific and technical explanations.

5. To omit, in general, self-explanatory terms, and such as are common to all mechanical and manufacturing trades.

In many instances, the locality in which a term is believed to have originated or to be peculiarly in use, is indicated by abbreviations which will mostly explain themselves. The principal regions named are England, Scotland, Wales, France, Germany, the United States, Spain (including Mexico), Australia, Cornwall, Derbyshire, Staffordshire, Newcastle, Devonshire, Lake Superior, Pennsylvania, and the Pacific Slope (including the mining districts of the Rocky Mountains).

*Arm.* The inclined member or leg of a set or frame of timber.

*Arrastre*, SP. Apparatus for grinding and mixing ores by means of a heavy stone dragged around upon a circular bed. The arrastre is chiefly used for ores containing free gold, and amalgamation is combined with the grinding. Sometimes incorrectly written *arraster*, *arrastra*, or *raster*.

*Anemometer.* An instrument for measuring the rapidity of an air-current.

*Anthracite.* See *Coal.*

*Anticlinal.* The line of a crest, above or under ground, on the two sides of which the strata dip in opposite directions. The converse of *synclinal.*

*Antimony ores.* Native antimony; *stibnite* (sulphide of antimony); *valentinite* and *senarmontite* (oxides).

*Apex.* In the U. S. Revised Statutes, the end or edge of a vein nearest the surface.

*Apolvillados*, SP. Ores superior in quality to the *azogues.*

*Aprons.* See *Copper-plates.*

*Arch*, CORN. A portion of a lode left standing when the rest is extracted, to support the *hanging wall* or because it is too poor for profitable extraction.

*Arenaceous.* Silicious or sandy (of rocks).

*Arenillos*, SP. Refuse earth.

*Argentiferous.* Containing silver.

*Argillaceous.* Containing clay.

*Arroba*, SP. Twenty-five pounds avoirdupois.

*Arsenic ores.* Native arsenic; *mispickel* (*arsenopyrite*, *arsenical pyrites*, arseno-sulphide of iron).

*Ascension-theory.* The theory that the matter filling fissure-veins was introduced in solution from below.

*Assay.* To test ores and minerals by chemical or blowpipe examination; said to be in *the dry way* when done by means of heat (as in a crucible), and in *the wet or humid way* when by means of solution and precipitation or liquid tests. An assay differs from a complete analysis in being confined to the determination of certain ingredients, the rest not being determined. Both assays and analyses may be either qualitative or quantitative; that is, they may determine the presence merely, or also the amount, of some or all of the constituents of the substance examined. The assay value of gold and silver ores is usually determined in Troy ounces (or, for gold, pennyweights) per ton (2000 pounds avoirdupois) of ore. See *Assay-ton.* When reported in money value, the ounce of gold is taken at $20.6718. A ton of pure gold would be worth $[illegible]02,928.51; the value of $6 per ton would be by weight one-thousandth per cent., and so on. Silver varies greatly in market value; but assayers often report their results according to the old U. S. standard, which made the ounce of pure silver worth $1.2929. The ton of silver, at this rate, would be worth $37,710.40; the value of $37 per ton would be by weight one-tenth per cent., and so on. For ordinary gold and silver ores, it is evident that the percentages would be inconveniently small as expressions of value. Assays of lead, copper, iron, etc., are reported in percentages.

*Assay-ton.* A weight of 29.166⅔ grams. Since one ton of 2000 pounds avoirdupois contains 29.166⅔ troy ounces, it is evident that each milligram of gold or silver obtained from one assay-ton of ore represents one ounce troy to the ton of 2000 pounds avoirdupois.

*Assessment-work*, PAC. The work done annually on a mining claim to maintain possessory title.

*Astel.* Overhead boarding or arching in a gallery.

*Astyllen*, ENG. A small dam in an adit or level, to check water.

*Atierres*, SP. Refuse ores.

*Attle*, CORN. Refuse rock.

*Auger-nose shell.* See *Wimble.*

*Auger-stem.* The bar to which a drilling-bit is attached.

*Augèt* or *Augètte.* A priming tube, used in blasting.

*Auriferous.* Containing gold.

*Average produce*, CORN. The quantity of pure or fine copper in one hundred parts of ore.

*Average standard*, CORN. The price per ton of pure or fine copper in the ore.

*Aviador*, SP. A person who *habilitates* a mine; that is, who furnishes the money for working it by a contract with proprietors.

*Azogueria*, SP. 1. The amalgamating works. 2. The process of amalgamation.

*Azogues*, SP. Common or inferior ores.

*Back*, CORN. 1. With reference to an adit drift, or stope, the part of the vein between it and the next working above, or the surface. 2. See *Face*.

*Back-casing*, ENG. A temporary shaft-lining of bricks laid dry, and supported at intervals upon *curbs*. When the *stone-head* has been reached, the permanent masonry lining is built upon it inside of the *back-casing*.

*Back-end*, NEWC. The part of a *judd* remaining after the *sump* has been removed.

*Backing deals*, NEWC. Planks driven vertically behind the curbs in a shaft from one curb to another.

*Back-shift*. The second set of miners working in any spot each day.

*Back-skin*, NEWC. A leather covering worn by men in wet workings.

*Bait*, NEWC. A pitman's provisions.

*Bal*, CORN. A mine.

*Balance-bob*. A heavy lever ballasted at one end, and attached at the other to the pump-rod, the weight of which it thus helps to carry. When the shaft is deep, and the pump-rods are consequently very heavy, balance-bobs are put in at intervals of 200 or 300 feet, thus relieving the strain on the rods themselves, and on the engine.

*Balk*, NEWC. A *hitch* producing a *nip*.

*Balland*, DERB. Pulverulent lead ore.

*Ballast-shovel*. A round-mouthed shovel.

*Ball Stamp*, LAKE SUP. A stamp for crushing rock, operated directly by steam-power, the stem of the stamp being at the same time the piston-rod of a steam cylinder.

*Band*, NEWC. Stone interstratified with coal.

*Bank*. 1. DERB (or *Benk*). The face of the coal at which miners are working. 2. An ore deposit or coal bed worked by surface excavations or drifts above water level. 3. ENG. The ground at the top of a shaft. Ores are brought "to bank," *i. e.*, "to grass." See *Grass*.

*Banksman*, NEWC. See *Lander*.

*Bar*. 1. A drilling or tamping-rod. 2. A vein or dike crossing a lode. 3. A sand or rock ridge crossing the bed of a stream.

*Bar-Diggings*. PAC. Gold-washing claims located on the bars (shallows) of a stream, and worked when the water is low, or otherwise with the aid of coffer-dams.

*Barilla*, SP. Native copper disseminated in grains in copper ores.

*Barmaster*, DERB. A mining official who collects the dues or royalties, presides over the *barmote*, etc. (From Germ. *Bergmeister*.)

*Barmote*, DERB. A mining court.

*Barney*. A small car attached to a rope and used to push cars up a slope or inclined plane.

*Barranca*, SP. A ravine.

*Barrel*. 1. The water-cylinder of a pump. 2. A piece of small pipe inserted in the end of a cartridge to carry the *squib* to the powder. 3. A vessel used in amalgamation.

*Barrel-amalgamation*. The amalgamation of silver ores by revolution in wooden barrels with quicksilver, metallic iron, and water.

*Barrel-work*, LAKE SUP. Native copper occurring in pieces of a size to be sorted out by hand in sufficient purity for smelting without mechanical concentration.

*Barrier-pillars*. *Pillars* of coal, larger than ordinary, left at intervals to prevent too extensive crushing when the ground comes to be *robbed*.

*Barrow*, CORN. 1. A heap of *attle* or rubbish; a *dump*. 2. A vehicle in which ore, coal, etc., are wheeled.

*Barrowmen*, NEWC. See *Putters*.

*Barrow-way*, NEWC. A *level* through which coal or ore is wheeled.

*Base bullion*. See *Bullion*.

*Base metals*. The metals not classed as *noble* or precious. See *Noble metals*.

*Basin*. 1. A natural depression of strata containing a coal bed or other stratified deposit. 2. The deposit itself.

*Bass* or *batt*. See *Bind*.

*Basset*, DERB. An outcrop; the edge of a stratum.

*Batch*, CORN. The quantity of ore sent to the surface by a *pare* of men.

*Batea*, SP. A large wooden bowl in which gold-bearing earth or crushed ore is washed in the same way as in a *pan*.

*Bath*. A mass of molten material in a furnace, or of solution in a tank.

*Batt.* See *Bind.*

*Battery.* 1. A set of *stamps* in a stamp-mill comprising the number which fall in one *mortar*, usually five. 2. A bulkhead of timber. 3. The plank closing the bottom of a *coal-chute.*

*Battery-amalgamation.* Amalgamation by means of mercury placed in the mortar.

*Battery-assay.* See *Pulp-assay.*

*Bauxite.* See *Aluminium ores.*

*Beans*, NEWC. Small coals.

*Bean-shot.* Copper granulated by pouring into hot water.

*Bear.* 1. See *Salamander.* 2. See *Loup.*

*Bearing.* See *Strike.*

*Bed.* A seam or deposit of mineral, later in origin than the rock below, and older than the rock above; that is to say, a regular member of the series of formations, and not an intrusion.

*Bedded-vein.* Properly *bed-vein* (*Lagergang* of the Germans); a lode occupying the position of a bed, that is, parallel with the stratification of the inclosing rocks.

*Bede.* A miner's pickaxe.

*Bed-rock*, PAC. The solid rock underlying alluvial and other surface formations.

*Bed-way.* An appearance of stratification, or parallel marking, in granite.

*Bell and hopper.* See *Cup and cone.*

*Belly-helve*, ENG. A forge hammer, lifted by a cam which acts about midway between the fulcrum and the head.

*Bench.* 1. One of two or more divisions of a coal seam, separated by slate, etc, or simply separated by the process or cutting the coal, one bench or layer being cut before the adjacent one. 2. To cut the coal in *benches.*

*Benching-up*, NEWC. Working on the top of coal.

*Bend* or *Bind*, DERB. Indurated clay.

*Beneficiar*, SP. To benefit. To work or improve a mine; to reduce its ores; to derive profit or advantage from working it. *Beneficiation*, sometimes used in English, usually means the reduction of ores.

*Biche.* A tool ending below in a conical cavity, for recovering broken rods from a bore-hole.

*Bind*, DERB. See *Bend.*

*Bing*, NORTH ENG. Eight hundred weight of ore.

*Bing-ore*, DERB. Ore in lumps.

*Bing-hole*, DERB. A hole or *shoot* through which ore is thrown.

*Bing-tale*, NORTH ENG. See *Tribute.*

*Bismuth ores.* Native bismuth; *bismuth ochre* (oxide); *bismuthine* (sulphide); also, bismuthiferous cobalt, silver and copper ores.

*Bit.* The cutting end of a boring implement.

*Bituminous coal.* See *Coal.*

*Black-band.* An earthy carbonate of iron, accompanying coal-beds. Extensively worked as an iron ore in Great Britain, and somewhat in Ohio.

*Black-damp*, ENG. Carbonic acid gas.

*Black-ends*, ENG. Refuse coke from cooking-ovens.

*Black-jack*, CORN. Zinc-blende; sometimes hornblende.

*Black-lead.* Graphite.

*Black-plate.* Sheet iron before tinning.

*Black-tin*, CORN. Tin ore prepared for smelting.

*Blanch.* Lead ore, mixed with other minerals.

*Blanket-sluices.* Sluices in which coarse blankets are laid, to catch the fine but heavy particles of gold, amalgam, etc., in the slime passing over them. The blankets are removed and washed from time to time, to obtain the precious metal.

*Blast.* The operation of *blasting*, or rending rock or earth by means of explosions.

*Blasting-stick.* A simple form of fuse.

*Bleaching-clay*, CORN. Kaolin, used with size, to whiten and give weight and substance to cotton goods.

*Blende.* See *Zinc ores.*

*Blind level.* 1. A level not yet connected with other workings. 2. A level for drainage, having a shaft at either end, and acting as an inverted siphon.

*Blind-shaft.* See *Winze.*

*Bloat.* A hammer swelled at the *eye.*

*Block-coal*, U. S. See *Coal.*

*Block-tin.* Cast tin.

*Blossom.* The oxidized or decomposed outcrop of a vein or coal-bed, more frequently the latter. Also called *smut* and *tailing.* See *Gossan.*

*Blower*, NEWC. 1. A strong discharge of gas from a fissure. 2. A *fan* or other apparatus for forcing air into a furnace or mine.

*Blow-george.* A hand-fan.

*Blow out.* 1. A large outcrop, beneath which the vein is smaller, is called a *blow-out.* 2. A *shot* or blast is said to *blow out* when it goes off like a gun and does not shatter the rock.

*Blowpipe.* A tube through which air is forced into a flame, to direct it and increase its intensity. In the compound blowpipe, two jets of gas (one of which may be air) are united at the point of combustion.

*Blue-billy*, ENG. The residuum of cupreous pyrites after roasting with salt.

*Blue-john*, DERB. Fluorspar.

*Blue lead.* (Pronounced like the verb *to lead.*) The bluish auriferous gravel and cement deposit found in the ancient river-channels of California.

*Blue peach*, CORN. A slate-blue very fine-grained schorl-rock.

*Blue stone.* Copper-vitriol; copper-sulphate.

*Boards.* The first set of excavations in *post-and-stall* work.

*Boat level*, WALES. A navigable *adit.*

*Bob*, CORN. A triangular frame, by means of which the horizontal motion imparted from an engine is transformed into a vertical motion of the pump-rods in a shaft.

*Bob-station.* See *Station.*

*Bog-iron ore.* A loose, earthy *brown hematite*, of recent origin, formed in swampy ground.

*Bonansa*, SP. Literally, fair weather. In miners' phrase, good luck, or a body of rich ore. A mine is *in bonansa* when it is profitably producing ore.

*Bone.* The slaty matter intercalated in coal-seams.

*Bonnet.* A covering over a cage to shield it from objects falling down the shaft.

*Bonney*, CORN. An isolated body of ore.

*Booming.* The accumulation and sudden discharge of a quantity of water (in placer mining, where water is scarce). See, also, *Hushing.*

*Bord*, NEWC. A passage or *breast*, driven up the slope of the coal from the gangway, and hence across the *grain* of the coal.

*Bord.* See *Boards*, *Breast*, and *Post-and-stall.*

*Board-and-pillar.* See *Post-and-stall.*

*Borer.* See *Drill.*

*Borrasca*, SP. The converse of *bonansa.* Barren rock.

*Bort.* Opaque black diamond.

*Bottom-lift.* The deepest lift of a mining-pump, or the lowest pump.

*Bottomer*, ENG. The man stationed at the bottom of a shaft in charge of the proper loading of cages, signals for hoisting, etc.

*Bottoms*, CORN. The deepest workings.

*Boulder* or *Bowlder.* A fragment of rock brought by natural means from a distance (though this notion of transportation from a distance is not always, in later usage, involved) and usually large and rounded in shape. *Cobble-stones* taken from river-beds are, in some American localities, called boulders.

*Bounds*, CORN. A tract of tin-ore ground.

*Bout*, DERB. A measure of lead-ore; twenty-four *dishes.*

*Bowke*, S. STAFF. A small wooden box in which iron-ore is hauled underground.

*Bowse* or *Bouse*, DERB. Lead-ore as cut from the lode.

*Box-bill.* A tool used in deep boring for slipping over and recovering broken rods.

*Box-timbering.* See *Plank timbering.*

*Brace*, CORN. The mouth of a shaft.

*Brace-head.* A cross-attachment at the top of the column of rods in deep boring, by means of which the rods and bit are turned after each drop.

*Brace-key.* See *Brace-head.*

*Braise*, U. S. Charcoal-dust. See *Breeze.*

*Brake-sieve.* A *jigger*, operated by a hand-lever.

*Brakesman.* The man in charge of a winding-engine.

*Brances.* See *Brasses.*

*Branch.* CORN. A small vein departing from the main lode, and in some cases returning.

*Brasses*, ENG. and WALES. Pyrites (sulphide of iron) in coal.

*Brat*, ENG. and WALES. A thin bed of coal mixed with pyrites or carbonate of lime.

*Brattice*, ENG., SCOT., and WALES. A plank lining, or a longitudinal partition of wood, brick, or even cloth, in a shaft, level, or gangway, generally to aid ventilation.

*Brasil.* Iron pyrites.

*Breaker.* See *Coal-breaker* and *Rock-breaker.*

*Breast.* 1. The *face* of a working. 2. In coal mines, the chamber driven upwards from the *gangway*, on the seam, between pillars of coal left standing, for the extraction of coal.

*Breast-boards.* Planking placed between the last set of timbers and the *face* of a *gangway* or *heading* which is in quicksand or loose ground.

*Breccia.* A *conglomerate* in which the fragments are angular.

*Breeding-fire.* See *Gob-fire.*

*Breeze*, ENG. Small coke. Probably connected, perhaps interchangeable, with *Braise*, and both with the FR. *Braise.*

*Brettis*, DERB. A *crib* of timber filled up with *slack* or waste.

*Brettis-way.* A road in a coal-mine, supported by *brettises* built on each side after the coal has been worked out.

*Bridle-chains.* Safety-chains to support a *cage* if the link between the cage and rope should break.

*Broaching-bit.* A tool used to restore the dimensions of a bore-hole which has been contracted by the swelling of the marl or clay walls.

*Brob.* A peculiar spike, driven alongside the end of an abutting timber to prevent its slipping.

*Broil* or *Broyl*, CORN. See *Bryle.*

*Broken coal*, PENN. See *Coal.*

*Brood*, CORN. The heavier kinds of waste in tin and copper ores.

*Brown coal.* See *Coal.*

*Browse.* Ore imperfectly smelted, mixed with cinder and clay.

*Bryle*, CORN. The traces of a vein, in loose matter, on or near the surface.

*Bucker*, DERB. A flat piece of iron with a wooden handle, used for breaking ore.

*Bucket.* The piston of a lifting-pump.

*Bucking*, DERB. See *Cobbing.* The *bucking-hammer* or *bucking-iron* is a broad-headed hammer used for this purpose; and the ore is broken on a flat piece of iron (bucking-plate).

*Buckwheat-coal*, PENN. See *Coal.*

*Buddle*, CORN. An inclined vat or stationary or revolving platform upon which ore is concentrated by means of running water. Strictly the *buddle* is a shallow vat, not a platform or *table*; at least not in some localities. But general usage, particularly on the Pacific slope, makes no distinction.

*Buggy.* A small mine-wagon holding ½ ton to 1 ton of coal.

*Buhrstone.* A quartz rock containing cellules.

*Bulkhead.* 1. A tight partition or stopping in a mine for protection against water, fire, or gas. 2. The end of a flume, whence water is carried in iron pipes to hydraulic workings.

*Bull.* See *Clay-iron.*

*Bullfrog.* See *Barney.*

*Bullion.* Uncoined gold and silver. *Base bullion* (PAC.), is pig lead containing silver and some gold, which are separated by refining.

*Bull-pump*, CORN. A direct single-acting pump, the steam cylinder of which is placed over the top of a shaft or slope, and the piston-rod attached to the pump-rods. The steam lifts piston and pump-rods, and the weight of these makes the down-stroke.

*Bull-wheel.* In rope-boring, a wheel on which is wound the rope for hoisting the bit, etc.

*Bully.* A pattern of miners' hammer, varying from "*broad-bully*" to "*narrow bully.*"

*Bunch of ore*, CORN. An ore-body, usually a small one.

*Bunding.* A staging of boards on *stulls* or *stemples*, to carry *deads.* See *stull-covering.*

*Buntons*, ENG. Battens or scantlings placed horizontally across a shaft, to which are nailed the boards forming the *cleading* or *sheathing* of a *brattice.*

*Burden*, CORN. The tops or heads of stream-work, which lie over the stream of tin.

*Burr*. Solid rock.

*Burrow*, CORN. A heap of refuse.

*Buscones*, SP. Searchers; explorers.

*Bushel*. The Imperial bushel, of 2218 cubic inches, and the Winchester bushel, of 2150 cubic inches, are divided into 4 pecks. The bushel used in measuring charcoal and coal contains 5 pecks, or 2680 cubic inches, being 20 pounds or less of charcoal, and, in various localities, 80, 76, or 72 pounds of coal.

*Butt*, ENG. Of coal; a surface exposed at right angles to the *face*. See *End*.

*Butty*, DERB. and STAFF. A miner by contract at so much per ton of coal or ore.

*Cable-tools*. The apparatus used in drilling deep holes, such as artesian wells, with a rope, instead of rods, to connect the drill with the machine on the surface.

*Cache*, FR. The place where provisions, ammunition, etc., are *cached* or hidden by trappers or prospectors in unsettled regions.

*Cage*. 1. A frame with one or more platforms for cars, used in hoisting in a vertical shaft. It is steadied by guides on the sides of the shaft. 2. A structure of elastic iron rods slipped into the bore-hole in *rod-boring* to prevent vibration of the rods. 3. The barrel or drum in a *whim* on which the rope is wound.

*Caking coal*. See *Coal*.

*Cala*, SP. A small pit or experimental hole.

*Cal*, CORN. Wolfram.

*Calicata*, SP. A digging or trial pit.

*Cañada*, SP. A ravine, or small cañon.

*Canch*. A part of a bed of stone worked by quarrying.

*Cand* or *Cann*, CORN. Fluorspar.

*Cank*, DERB. See *Whinstone*.

*Cañon*, SP. A valley, usually precipitous; a gorge.

*Cannel coal*. See *Coal*.

*Cap* or *Cap-rock*. Barren vein matter, or a *pinch* in a vein, supposed to overlie ore.

*Capel*. A composite stone of quartz, schorl, and hornblende.

*Captain*. CORN and WALES. The official in immediate charge of the work in a mine.

*Carat*. 1. A unit employed in weighing diamonds, and equal to 3⅙ troy grains. A *carat-grain* is one-fourth of a carat. 2. A term employed to distinguish the fineness of a gold alloy, and meaning one-twenty-fourth. Fine gold is 24-*carat* gold. Goldsmiths' standard is 22 *carats* fine, *i. e.*, contains 22 parts gold, 1 copper, and 1 silver.

*Carbona*, CORN. An irregular deposit or impregnation of tin ore, found in connection with a tin lode.

*Carbonaceous*. Containing carbon not oxidized.

*Carbonates*. The common term in the West for ores containing a considerable proportion of carbonate of lead. They are sometimes earthy or ochreous (soft carbonates), sometimes granular and comparatively free from iron (sand carbonates), and sometimes compact (hard carbonates). Often they are rich in silver.

*Carga*, SP. A mule-lode of 300 pounds avoirdupois.

*Case*. A small fissure, admitting water into the workings.

*Casing*, CORN. 1. A partition or *brattice*, made of *casing-plank*, in a shaft. 2. PAC. *Casings* are zones of material altered by vein-action, and lying between the unaltered country rock and the vein.

*Cast-after-cast*, CORN. The throwing up of ore from one platform to another successively. See *Shambles*.

*Cata*, SP. A mine denounced, but unworked.

*Cat-head*. 1. A small capstan. 2. A *broad-bully* hammer. See *Bully*.

*Cauf*, NEWC. See *Corf*.

*Caunter-lode*, CORN. A vein coursing at a considerable angle to neighboring veins.

*Caving*. The falling in of the sides or top of excavations.

*Cawk*. Sulphate of baryta (heavy spar).

*Caso*, SP. A caldron in which amalgamation is effected by the *caso* process, used in Mexico and South America.

*Cement*, AUSTR. and PAC. Gravel firmly held in a silicious matrix, or the matrix itself.

*Cerro*, SP. A hill or mountain.

*Chacing*. Following a vein by its range or direction.

*Chaldron.* Thirty-six bushels. In Newcastle fifty-three hundred weight avoirdupois. *Chaldron-wagons*, containing this quantity, convey the coal from the pit to the place of shipment.

*Chalybeate.* Impregnated with iron (applied to mineral waters).

*Chamber.* See *Breast.*

*Champion lode.* The main vein as distinguished from branches.

*Changing-house*, CORN. A room where miners change and dry their underground clothing. See *Dry.*

*Charbon roux*, FR. Brown charcoal, produced by an incomplete carbonization of wood.

*Charge.* The amount of explosive used for one blast.

*Charger*, CORN. An auger-like implement for charging horizontal bore-holes for blasting.

*Charring.* The expulsion by heat of the volatile constituents of wood, etc., leaving more or less pure vegetable carbon.

*Chartermaster*, S. STAFF. See *Butty.*

*Chats*, NORTHUMB. Small pieces of stone with ore.

*Cheeks.* 1. The sides or walls of a vein. 2. Extensions of the sides of the *eye* of a hammer or *pick.*

*Chert.* Hornstone; a silicious stone often found in limestone.

*Cherry coal*, ENG. See *Coal.*

*Chestnut coal*, PENN. See *Coal.*

*Chilian mill.* An improved *arrastre*, in which a heavy stone wheel is rolled around the bed.

*Chimming*, CORN. See *Tossing.*

*Chimney.* An ore-shoot. See *Chute.*

*China clay.* Kaoline.

*Chisel.* See *Bit.*

*Chock.* See *Nog.*

*Choke damp*, ENG. Carbonic acid gas.

*Chlorides*, PAC. A common term for ores containing chloride of silver.

*Chrome ore.* Chromic iron (*chromite*, oxide of chromium, and oxide of iron).

*Chute.* (Sometimes written *shoot.*) 1. A channel or shaft underground, or an inclined trough above ground, through which ore falls or is "shot" by gravity from a higher to a lower level. 2. A body of ore, usually of elongated form, extending downward within a vein (*ore-shoot*). The two forms of orthography of this word are of French and English origin respectively. Under *chute*, the original idea is that of falling; under *shoot*, that of shooting or branching. Both are appropriate to the technical significations of the word. An *ore-shoot*, for instance, may be considered as a branch of the general mass of the ore in a deposit, or as a pitch or fall of ore (GERM. *erzfall*). In England the orthography *shoot* is, I believe, exclusively employed, and this is perhaps the best, the other being unnecessarily foreign.

*Cinnabar.* Sulphuret of mercury.

*Cistern*, CORN. See *Tank.*

*Clack*, CORN. A pump-valve.

*Clack-door*, CORN. An opening into the valve-chamber of a pump.

*Claggy*, NEWC. Adhesive. When the coal is tightly joined to the roof, the mine is said to have a *claggy top.*

*Claim*, PAC. The portion of mining ground held under the Federal and local laws by one claimant or association, by virtue of one location and record.

*Clanny lamp.* The safety-lamp invented by Dr. Clanny.

*Clay-iron.* A tool for crowding clay into leaky bore-holes.

*Cleading*, ENG. See *Buntons.*

*Clean-up.* The operation of collecting all the valuable product for a given period or operation in a stamp mill, or in a hydraulic or placer mine.

*Cleat.* 1. A joint in coal or rock. 2. A strip of wood.

*Cleavage.* The property in a mineral, of splitting more easily and perfectly in some directions than in others. The planes of cleavage bear a relation to the crystal form of the mineral. The *cleavage* of rock-masses is more properly a jointing, unless it follows the planes of bedding.

*Clinker.* The product of the fusion of the earthy impurities (ash) of coal during its combustion.

*Clinometer*. A simple apparatus for measuring by means of a pendulum or spirit-level and circular scale, vertical angles, particularly *dips*.

*Clod*. Soft shale or slate, in coal mines, usually applied to a layer forming a bad roof.

*Clotting*. The sintering or semi-fusion of ores during roasting.

*Coal* (ENG. *Coals*). This term is now applied to *stone-coal* or *pit-coal*, that is, mineral coal, obtained by mining, as distinguished from charcoal. No scientific account of the nature and origin of coal will be given here. The three principal classes recognized by common usage are *anthracite* (hard, black, composed, when pure, almost exclusively of carbon), *bituminous* or *coking coal* (brown or black, containing hydrocarbons), and *lignite* or *brown coal* (brown or black, generally showing a woody or a laminar structure, containing much water, and more recent, geologically speaking, than the other varieties). *Semi-anthracites* and *semi-bituminous coals* are gradations between *anthracite* and *bituminous*, based on the increasing percentage of volatile matters. *Hydrogenous* or *gas-coals* are bituminous coals yielding the highest percentage of volatile matters. The English classification of *bituminous coals* distinguishes *coking coal* proper (splintering when heated, but subsequently fusing into a semi-pasty mass), *cherry* or *soft coal* (igniting readily and burning rapidly without splintering or fusion), *splint*, *rough* or *hard coal* (igniting with more difficulty but burning with a clear, hot fire), and *cannel coal* (the *parrot coal* of Scotland, compact, homogeneous, conchoidal in fracture, burning with clear, bright flame). The English call *anthracite* also *stonecoal* or *culm*, and speak of a *semi-anthracite* as *steam-coal*. Any coal advantageously used for generating steam is called a *steam-coal* in the United States. The solid carbon remaining after the expulsion of volatile matters from *bituminous coal* or *lignite* is called *coke*. Commercial *coke*, however, must have a certain coherence and strength; and the coals which furnish it in this condition are called *coking coals*. A peculiar bituminous coal of Indiana and Ohio, which breaks in blocks, and is used raw without coking, to some extent, as a blast-furnace fuel, is called *block-coal*. *Anthracite* is divided in the United States according to the color of the ash after burning, into *white-ash*, *red-ash*, and *pink-ash coal*. It is also classified for the market according to the size of the pieces (see *Coal-breaker*), as follows: *Lump* includes the largest lumps as they come from the mine. The other sizes pass over and through sieve-meshes of the size named, the figures signifying inches, and thus indicating roughly the average limit of diameter for the pieces in each size, viz.:

| | | |
|---|---|---|
| *Steamboat*, | through 7 | over 4; |
| No. 1, *Broken* or *grate*, | through 4 | over 2¾ to 2½; |
| No. 2, *Egg*, | through 2¾ to 2½ | over 2¼ to 2; |
| No. 3, *Large stove*, | through 2¼ to 2 | over 1⅞ to 1½; |
| No. 4, *Small stove*, | through 1⅞ to 1½ | over 1⅛ to 1; |
| No. 5, *Chestnut*, | through 1⅛ to 1 | over ⅝ to ½; |
| No. 6, *Pea*, | through ⅝ to ½ | over ⅜ to ¼. |

No. 7, *Buckwheat*, is rarely made, except when the coal is washed on the screens, and the *chestnut* and *pea* have the larger dimensions above given. It is the smallest size, and usually included in the dirt or *culm*.

*Coal-breaker*. A building containing the machinery for breaking coal with toothed rolls, sizing it with sieves, and cleaning it for market.

*Coal-pipes*, NEWC. Very thin irregular layers of coal.

*Cobalt-ores*. *Cobalt-speiss* (*smaltine*, *chloanthite* when niccoliferous, *safflorite* when ferriferous, or arsenide of cobalt with or without nickel or iron); *cobalt glance* and *cobalt pyrites* (*smaltite* and *linnæite*, sulphides of cobalt); *cobalt bloom* (*erythrite*, arseniate of cobalt).

*Cobbing*, CORN. Breaking ore to sort out its better portions. See *Spall*.

*Cobre ores*. Copper ores from Cuba.

*Cockle*, CORN. See *Schorl*.

*Cod*, NEWC. The bearing of an axle.

*Coffer* or *Cofer*, DERB. 1. To secure a shaft from leaking by ramming in clay behind the masonry or timbering. 2. (or *Cover*) CORN. See *Mortar* (2). 3. A rectangular plank frame, used in timbering *levels*.

*Coffin*, CORN. 1. An old open working. 2. The mode of open working by casting up ore and waste from one platform to another, and so to the surface.

*Cogs*. See *Nogs*; only *cogs* are not squared, but simply notched where they cross each other. The interior of a structure of this kind and the spaces between the timbers are usually filled with *gob*. They are called also *cobs*, *corncobs*, etc.

*Coil-drag.* A tool to pick up pebbles, bits of iron, etc., from the bottom of a drill-hole.

*Collar.* 1. See *Cap.* 2. The *collar* of a shaft is the horizontal timbering around the mouth.

*Colliery.* A coal mine.

*Collom washer*, LAKE SUP. A variety of *jig.*

*Color*, SP. 1. Color. The shade or tint of the earth or rock which indicates ore. 2. A particle of metallic gold found in the prospector's pan after a sample of earth or crushed rock has been "panned out." Prospectors say, *e. g.*, "The dirt gave me so many colors to the panful."

*Colorados*, SP. Ores impregnated with oxide of iron, and in a state of decomposition See *Gossan.*

*Col-rake.* A shovel used to stir lead-ores during washing.

*Comb.* The place in a fissure which has been filled by successive depositions of mineral on the walls, where the two sets of layers thus deposited approach most nearly or meet, closing the fissures and exhibiting either a drusy central cavity, or an interlocking of crystals.

*Compass.* An instrument like the ordinary nautical or surveyor's compass, though sometimes otherwise marked, and having a *clinometer* attached. Also, a *dip-compass*, for tracing magnetic iron ore, having a needle hung to move in a vertical plane.

*Concentration.* The removal by mechanical means of the lighter and less valuable portions of ore.

*Concentrator.* An apparatus in which, by the aid of water or air and specific gravity, mechanical concentration of ores is performed.

*Conglomerate.* A rock consisting of fragments of other rocks (usually rounded) cemented together.

*Consume.* The chemical and mechanical loss of mercury in amalgamation.

*Contact.* The plane between two adjacent bodies of dissimilar rock. A *contact-vein* is a vein, and a *contact-bed* is a bed, lying, the former more or less closely, the latter absolutely, along a contact.

*Cope*, DERB. To contract to mine lead-ore by the *dish*, load, or other measure.

*Coper*, DERB. One who contracts to raise lead-ore at a fixed rate.

*Copperas.* Ferrous sulphate.

*Copper-ores.* Native copper; red copper-ore (*cuprite*, protoxide); green and blue *malachite* (*malachite* and *azurite*, carbonates); *copper glance* (*chalcocite*, sulphide); *purple copper* (variegated or *peacock* ore, *bornite*, sulphide of copper and iron); *gray copper* (*fahl-ore*, *tetrahedrite*, sulphantimonide of copper and other metals); *yellow copper* (*copper-pyrites*, *chalcopyrite*, sulphide of copper and iron); *copper-lead ore* (*bournonite*, sulphantimonide of lead and copper); *black copper-ore* (an earthy and variable mixture of sulphide and oxide of copper).

*Copper-plates*, AUSTR. and PAC. The plates of amalgamated copper over which the auriferous ore is allowed to flow from the stamp-battery, and upon which the gold is caught as amalgam.

*Corbond.* An irregular mass or "dropper" from a lode.

*Core*, CORN. A miner's underground working-time or *shift.*

*Corf*, *Corve*, or *Cauf* (the last incorrect). 1. NEWC. A large basket used in hoisting coal; from the GERM. *Korb.* 2. A wooden frame to carry coal. 3. A sled or low wagon for the same purpose.

*Cornish pump.* A pump operated by rods attached to the beam of a single-acting, condensing beam-engine. The steam, pressing down the piston in the vertical steam-cylinder, lifts the pump-rods, and these subsequently descend by their own weight.

*Coro-coro.* A dressed product of copper-works in South America, consisting of grains of native copper mixed with pyrite, chalco-pyrite, mispickel, and earthy minerals.

*Cost-book*, CORN. A book used to keep accounts of mining enterprises carried on under the *cost-book system*, peculiar to Cornwall and Devon, and differing from both partnership and incorporation. It resembles the mining partnership system of the Pacific States.

*Costeaning* or *Costeening*, CORN. Discovering veins by pits and open cuts, run on the surface transversely to the supposed course of the veins.

*Counter.* 1. A cross-vein. 2. (Or *counter-gangway.*) A gangway driven obliquely upwards on a coal-seam from the main gangway until it cuts off the faces of the workings, and then continues parallel with the main gangway. The oblique portion is called the *run.*

*Country*, or *Country-rock*, CORN. The rock traversed by or adjacent to an ore deposit.

*Course.* See *Strike.*

*Course of ore.* See *Chute* (2).

*Coursing.* Conducting the air-current of a mine in different directions by means of doors and stoppings.

*Cousin Jack.* A common nickname for a Cornishman.

*Covered binding*, CORN. See *Plank-timbering.*

*Cow.* A kind of self-acting brake for inclined planes; a trailer.

*Cowl.* See *Water-barrel.*

*Coyoting*, PAC. Mining in irregular openings or burrows, comparable to the holes of *coyotes* or prairie foxes.

*Crab.* A machine for moving heavy weights. Specially the engines employed for lowering into place the pumps, rods, pipes, etc., of Cornish *pit-work.*

*Cradle*, PAC. See *Rocker.*

*Cramp.* A pillar of rock or mineral left for support.

*Cranch.* Part of a vein left by old workers.

*Craze* or *Crease*, CORN. The tin-ore which collects in the middle part of the *buddle.*

*Creep*, NEWC. A rising of the floor of a gangway, occasioned by the weight of incumbent strata, in pillar workings. Also any slow movement of mining ground.

*Cretaceous.* 1. Chalky. 2. See *Geological formations.*

*Crevice*, PAC. 1. A shallow fissure in the bed-rock under a gold placer, in which small but highly concentrated deposits of gold are found. 2. The fissure containing a vein.

*Crib.* 1. See *Curb.* 2. A structure composed of frames of timber laid horizontally upon one another, or of timbers built up as in the walls of a log cabin. 3. A miner's luncheon.

*Cribbing.* Close timbering, as the lining of a shaft, or the construction of *cribs* of timber or timber and earth or rock, to support a roof.

*Cribble.* A sieve.

*Crop.* 1. CORN. See *Crop tin.* 2. The *basset* or *outcrop* of strata at the surface. 3. To leave coal at the bottom of a bed.

*Cropping out.* The rising of layers of rock to the surface. That part of a vein which appears above the surface is called the *cropping* or *outcrop.*

*Crop-tin.* The chief portion of tin-ore separated from waste in the principal dressing operation.

*Cross-course*, CORN. An intersecting (usually a barren) vein.

*Cross-cut.* A level driven across the course of a vein, or, in general, across the direction of the main workings (as to connect two parallel gangways), or across the "grain of coal."

*Cross-heading.* A heading driven across from one gangway or breast to another, usually for ventilation.

*Cross-vein.* An intersecting vein.

*Crow* or *crow-foot.* A tool with a side-claw, for grasping and recovering broken rods in deep-bore holes.

*Crush.* 1. A *squeeze*, accompanied, perhaps, with more violent motion and effects. 2. A variety of fault in coal. See *Fault* (2).

*Crusher.* A machine for crushing ores.

*Cry of tin.* The peculiar crackling noise produced in bending a piece of metallic tin.

*Culm.* 1. ENG. Anthracite. 2, PENN. The waste or *slack* of the Pennsylvania anthracite mines, consisting of fine coal, more or less pure, and coal-dust and dirt.

*Curb.* A timber frame, circular or square, wedged in a shaft to make a foundation for walling or tubbing, or to support, with or without other timbering, the walls of the shaft.

*Curbing.* See *Cribbing.*

*Cut.* 1. To intersect a vein or working. 2. To excavate coal.

*Dam.* 1. To keep back water in a stream or mine by means of a dam or bulkhead. 2. S. STAFF. See *Stopping* and *Bulkhead.*

*Damp sheet*, S. STAFF. A large sheet, placed as a curtain or partition across a gate-road, to stop and turn an air-current.

*Dan*, NEWC. A truck or sled used in coal mines.

*Dant*, NEWC. Soft, inferior coal; *mineral charcoal.*

*Davy lamp.* The safety lamp invented by Sir H. Davy.

*Day*, WALES. The surface of the ground over a mine. *Day-level.* An *adit.* *Day-water.* Water from the surface.

*Dead*, CORN. 1. Unventilated. 2. As to a vein or piece of ground, unproductive.

*Deadened mercury.* See *Floured.*

*Dead riches.* See *Base bullion.*

*Dead roasting.* Roasting carried to the farthest practicable degree in the expulsion of sulphur.

*Deads*, CORN. The waste rock, packed in excavations from which ore or coal has been extracted.

*Dead-work.* Work that is not directly productive, though it may be necessary for exploration and future production.

*Deal.* Plank used in shaft and gallery construction.

*Dean*, CORN. The end of a level.

*Débris*, FR. The fragments resulting from shattering or disintegration.

*Deep*, CORN. The lower portion of a vein; used in the phrase *to the deep, i. e.*, downward upon the vein.

*Denunciar*, SP. To denounce. To give information that a mine is forfeited for being insufficiently worked, or for a violation of some condition which imposes that penalty. This term is also applied to the giving notice of a discovery, for the purpose of registry.

*Deposit.* The term *mineral deposit* or *ore-deposit* is arbitrarily used to designate a natural occurrence of a useful mineral or ore in extent and degree of concentration to invite exploitation.

*Derrick.* 1. See *Whip.* 2. The hoisting-tower over an artesian well-boring.

*Descension-theory.* The theory that the material in veins entered from above.

*Deuing*, CORN. See *Dissuing.*

*Desulphurisation.* The removal of sulphur from sulphuret ores.

*Dial*, CORN. See *Compass.* To *dial* a mine is to make a survey of it.

*Diamond-drill.* A form of rock drill in which the work is done by abrasion instead of percussion, black diamonds (*borts*) being set in the head of the boring tool.

*Die.* A piece of hard iron, placed in a mortar to receive the blow of a stamp, or in a pan to receive the friction of the muller. Between the die and the stamp or muller the ore is crushed.

*Dig*, CORN. See *Gouge.*

*Diggings.* Applicable to all mineral deposits and mining camps, but in usage in the United States applied to placer-mining only.

*Dike.* A vein of igneous rock.

*Dilluing* or *dilleughing*, CORN. An operation performed in tin-dressing upon the slimes of a certain part of the process. It is like the operation of *panning*, only performed with a sieve having a close haircloth bottom, and in a *kieve* of water which receives the tailings of the process.

*Diluvium.* Sand, gravel, clay, etc., in superficial deposits. See *Drift.* According to some authors, alluvium is the effect of the ordinary, and diluvium of the extraordinary action of water. The latter term is now passing out of use as not precise, and more specific names for the different kinds of material are substituted.

*Dip.* The inclination of a vein or stratum below the horizontal. The dip at any point is necessarily at right angles with the local *strike*, and its inclination is steeper than that of any other line drawn in the plane of the vein or stratum through that point.

*Dipping-needle.* See *Compass.*

*Discovery*, PAC. The first finding of the mineral deposit in place upon a mining claim. A *discovery* is necessary before the location can be held by a valid title. The openingin which it is made is called *discovery-shaft*, *discovery-tunnel*, etc.

*Dish*, CORN. 1. The landowner's or lord's part of the ore. 2. DERB. A measure of 14, 15, or 16 pints.

*Dissuing*, CORN. Cutting out the *selvage* or *gouge* of a lode, to facilitate the ore-extraction.

*District.* In the States and Territories west of the Missouri, a vaguely-bounded and temporary division and organization made by the inhabitants of a mining region. A district has one code of mining laws, and one recorder. Counties and county officers are gradually taking the place of these cruder arrangements.

*Disch.* An artificial water-course flume, or canal, to convey water for mining. A flume is usually of wood; a ditch, of earth.

*Divining-rod* or *Dowsing-rod*, CORN. A rod (most frequently of witch-hazel, and forked in shape) used, according to an old but still extant superstition, for discovering mineral veins and springs of water, and even for locating oil wells.

*Doggy*, S. STAFF. An underground superintendent, employed by the *butty*.

*Dog-hole*. A small *proving-hole* or airway, usually less than five feet high.

*Dole*. A division of a parcel of ore.

*Dolly-tub*, CORN. A tub in which ore is washed, being agitated by a *dolly*, or perforated board.

*Dope*. See *Explosives*.

*Dotts* or *Dott-holes*. Small openings in the vein.

*Downcast*. The opening through which the ventilating air-current descends into a mine.

*Dradge*, CORN. The inferior portions of ore, separated from the *prill* by cobbing.

*Drag*. The lower part of a *flask*. The mould having been prepared in the two parts of the flask, the *cope* is put upon the *drag* before casting. After casting, the flask is opened by removing the *cope*.

*Drag twist*. A spiral hook at the end of a rod, for cleaning bore-holes.

*Draught*, S. STAFF. The quantity of coal raised *to bank* in a given time.

*Draw*. To *rob* pillars or the top-coal of breasts before abandoning the ground.

*Dredge*. Very fine mineral matter held in suspension in water.

*Dresser*, S. STAFF. A large pick, with which the largest lumps of coal are prepared for loading into the *skip*.

*Dressing*, CORN. The picking and sorting of ores, and washing, preparatory to reduction.

*Drift*. 1. A horizontal passage underground. A *drift* follows the vein, as distinguished from a *cross-cut*, which intersects it, or a *level* or *gallery*, which may do either. 2. Unstratified *diluvium*.

*Drill*. A metallic tool for boring in hard material. The ordinary miner's drill is a bar of steel, with a chisel-shaped end, and is struck with a hammer. See *Rock-drill*, *Diamond-drill*.

*Driving*. Extending excavations horizontally. Distinguished from *sinking* and *raising*.

*Dropper*, CORN. A branch leaving the main vein on the *footwall* side.

*Drowned level*. See *Blind level* (2).

*Druggon*, S. STAFF. A square iron or wooden box, used for conveying fresh water for horses, etc., in a mine.

*Drum*. That part of the winding machinery on which the rope or chain is coiled.

*Druse*. A crystallized crust lining the sides of a cavity.

*Dry*, CORN. See *Changing-house*.

*Dualin*. See *Explosives*.

*Dumb-drift*. An *air-way* conveying air around, not through, a ventilating furnace to the *upcast*.

*Dump*. 1. To unload a vehicle by tilting or otherwise, without handling or shoveling out its contents. 2. A pile of ore or rock.

*Dumper*. A tilting-car used on *dumps*.

*Dun*, CORN. A frame of timbering, like a door-frame.

*Dutch metal*. An alloy of copper and zinc, containing more copper than ordinary brass.

*Duty*. A measure of the effectiveness of a steam-engine, usually expressed in the number of foot-pounds (or kilogrammetres) of useful work obtained from a given quantity of fuel.

*Duty ore*, CORN. The landlord's share of the ore.

*Dyke*. See *Dike*.

*Dzhu*, CORN. To cut ahead on one side of a *face*, so as to increase the efficacy of blasting on the remainder. (Doubtless the same word as *Dissue*. See *Dissuing*.) Also called *to hulk*.

*Egg-coal*, PENN. See *Coal*.

*Egg-hole*, DERB. A notch cut in the wall of a lode to hold the end of a *stempel*.

*Elvan*, CORN. A name given to certain broad granite veins or belts in schistose rocks.

*Emery*. Impure corundum.

*End of coal*. The direction or section at right-angles to the *face*; sometimes called the *butt*.

*End-pieces*, CORN. See *Wall-plates*.

*Entry*. An *adit*. Applied to the main *gangway* in some coal mines.

*Exploder*. A cap or fulminating cartridge, placed in a charge of gunpowder or other explosive, and exploded by electricity or by a fuse. See *Explosives*.

*Exploitation*, FR. The productive working of a mine, as distinguished from exploration.

*Explosives*. The principal explosives used in mining are *gunpowder*, a compound of sulphur, charcoal, and potassium nitrate (potash saltpeter) or sodium nitrate (Chili or soda-saltpeter); *nitro-glycerin*, a liquid compound of carbon, hydrogen, nitrogen, and oxygen, produced by the action of nitric acid upon glycerin; *dynamite No.* 1, or *giant powder*, a mixture of nitro-glycerin with a dry pulverized mineral or vegetable absorbent or *dope* (commonly silicious or infusorial earth); *dynamite No.* 2, nitro-glycerin mixed with saltpeter, sawdust, or coaldust, paraffin, etc., in lieu of an inexplosive *dope*; *litho-fracteur*, nitro-glycerin mixed with silicious earth, charcoal, sodium, and sometimes barium nitrate and sulphur; *dualin*, nitro-glycerin mixed with potassium nitrate and fine sawdust; *rend-rock*, *Hercules*, *Neptune*, *tonite*, *vigorite*, and other powders, resembling dynamite No. 2, *i. e.*, consisting of nitro-glycerin with a more or less explosive *dope*; and *mica-powder*, a No. 1 *dynamite*, in which the *dope* is fine scales of mica. The *chlorate*, *picrate*, and *fulminate* explosives are not used in mining, except the fulminate of mercury, which is employed for the *caps* or *exploders*, by means of which charges of powder, dynamite, etc., are fired.

*Eye*. 1. The top of a shaft. 2. The hole in a *pick* or hammer-head which receives the handle.

*Face*. 1. In any adit, tunnel, or slope, the end at which work is progressing or was last done. 2. The *face of coal* is the principal cleavage-plane at right angles to the stratification. Driving *on the face* is driving against or at right angles with the face.

*Fagot*. See *Pile*.

*Fahlband*, GERM. A zone or stratum in crystalline rock, impregnated with metallic sulphides. Intersecting fissure-veins are enriched by the *fahlband*.

*Famp*, NEWC. Soft, tough, thin shale beds.

*Fan*. A revolving machine, to blow air into a mine (*pressure-fan*, *blower*), or to draw it out (*suction-fan*).

*Fanega*, SP. A bushel; sometimes half a mule-load.

*Fang*, DERB. An air-course cut in the side of a shaft or level, or constructed of wood.

*Fast-end*. 1. The part of the coal-bed next the rock. 2. A gangway with rock on both sides. See *Loose-end*.

*Fast shot*, NEWC. A charge of powder exploding without the desired effect.

*Fathom*, CORN. Six feet. A *fathom of mining ground* is six feet square by the whole thickness of the vein, or in Cornish phrase, *a fathom forward by a fathom vertical*.

*Fathom-tale*, CORN. See *Tut-work* (2). This name probably arises from the payment for such work by the space excavated, and not by the ore produced.

*Fault*. 1. A dislocation of the strata or the vein. 2. In coal-seams, sometimes applied to the coal rendered worthless by its condition in the seam (*slate-fault*, *dirt-fault*, etc.).

*Feather*. See *Plug and feather*.

*Feathering*. See *Plugging*.

*Feeder*. 1. A small vein joining a larger vein. 2. A spring or stream. 3. A *blower* of gas.

*Feigh*, NEWC. Refuse washed from lead-ore or coal.

*Fell*. See *Riddle*.

*Felspathic*. Containing felspar as a principal ingredient.

*Ferruginous*. Containing iron.

*Fettle*, *Fettling*. See *Fix*.

*Fire-clay*. A clay comparatively free from iron and alkalies, not easily fusible, and hence used for fire bricks. It is often found beneath coal-beds.

*Fire-damp*. Light carburetted hydrogen gas. When present in common air to the extent of one-fifteenth to one-thirteenth by volume, the mixture is explosive.

*Fire-setting*. The softening or cracking of the working-face of a lode, to facilitate excavation, by exposing it to the action of a wood-fire built close against it. Now nearly obsolete, but much used in hard rock before the introduction of explosives.

*Fire-stink*, S. STAFF. The stench from decomposing iron pyrites, caused by the formation of sulphuretted hydrogen.

*Fissure-vein.* A fissure in the earth's crust filled with mineral.

*Flang*, CORN. A two-pointed miner's pick.

*Flange.* Applied to a vein widening.

*Flap-door*, NEWC. A manhole door.

*Flask.* An iron bottle in which quicksilver is sent to market. It contains 76½ pounds.

*Flat*, DERB. and N. WALES. A horizontal vein or ore-deposit auxiliary to a main vein; also any horizontal portion of a vein elsewhere not horizontal.

*Flat-nose shell.* A cylindrical tool with valve at bottom, for boring through soft clay.

*Flat-rods.* A series of horizontal or inclined connecting-rods, running upon rollers, or supported at their joints by rocking-arms, to convey motion from a steam-engine or water-wheel to pump-rods at a distance.

*Flat-wall*, CORN. A local term (in St. Just) for *foot-wall.*

*Float-copper*, LAKE SUP. Fine scales of metallic copper (especially produced by abrasion in stamping) which do not readily settle in water.

*Float-gold*, PAC. Fine particles of gold, which do not readily settle in water, and hence are liable to be lost in the ordinary stamp-mill process.

*Float-ore.* Water-worn particles of ore; fragments of vein-material found on the surface, away from the vein-outcrop.

*Flookan* or *Flooking*, CORN. See *Fluccan.*

*Floor.* 1. The rock underlying a stratified or nearly horizontal deposit, corresponding to the *foot-wall* of more steeply-dipping deposits. 2. A horizontal, flat ore-body. 3. A floor, in the ordinary sense, or a plank platform underground.

*Floran-tin*, CORN. Tin ore scarcely visible in the stone, or stamped very small.

*Flosh*, CORN. A rude mortar, with a shutter instead of a screen, used under stamps.

*Floured.* The finely granulated condition of quicksilver, produced to a greater or less extent by its agitation during the amalgamation process.

*Fluccan*, CORN. Soft clayey matter in the vein; a vein or course of clay.

*Flume.* A wooden conduit, bringing water to a mill or mine.

*Foal*, NEWC. A young boy employed in *putting* coal.

*Fodder*, NORTH ENG. A unit employed in expressing weights of metallic lead, and equal to 21 hundredweight of 112 pounds avoirdupois.

*Foot-piece.* See *Sill.*

*Foot-wall*, CORN. The wall under the vein.

*Foot-way.* The series of ladders and *sollars* by which men enter or leave a mine.

*Forefield*, NEWC. The face of the workings. The *forefield-end* is the end of the workings farthest advanced.

*Forfeiture.* The loss of possessory title to a mine or public lands by failure to comply with the laws prescribing the quantity of *assessment* work, or by actual abandonment.

*Fore-poling.* A method of securing drifts in progress through quicksand by driving ahead poles, lath, boards, slabs, etc., to prevent the inflow of the quicksand on the sides and top, the face being protected by *breast-boards.*

*Fore-winning*, NEWC. Advanced workings.

*Formation.* See *Geological formations.*

*Fork.* 1. CORN. The bottom of the *sump.* 2. DERB. A piece of wood supporting the side of an excavation in soft ground.

*Forpale* or *Forepale.* The driving of timbers or planks horizontally ahead at the working-face, to prevent the caving of the ground in subsequent driving.

*Fossil ore.* Fossiliferous red hematite.

*Fother*, NEWC. One-third of a chaldron.

*Foundershaft.* The first shaft sunk.

*Frame*, CORN. See *Tin-frame.*

*Free.* Native, uncombined with other substances, as free gold or silver.

*Free fall.* An arrangement by which, in deep boring, the *bit* is allowed to fall freely to the bottom at each drop or down-stroke.

*Free-milling.* Applied to ores which contain free gold or silver, and can be reduced by crushing and amalgamation, without roasting or other chemical treatment.

*Frue vanner.* A variety of continuously working *percussion-table.*

*Furnace.* 1. A structure in which heat is produced by the combustion of fuel. 2. A structure in which, with the aid of heat so produced, the operations of roasting, reduction, fusion, steam-generation, desiccation, etc., are carried on, or, as in some mines, the *upcast* air-current is heated, to facilitate its ascent and thus aid ventilation.

*Furtherance*, NEWC. An extra price paid to *hewers* when they also *put* the coal.

*Fuse*. A tube or casing filled with combustible material, by means of which a blast is ignited and exploded.

*Gad*. 1. A steel wedge. 2. A small iron punch with a wooden handle used to break up ore.

*Gale*, ENG. (Forest of Dean.) A grant of mining ground.

*Galiage*. Royalty.

*Gallery*. A level or drift.

*Gallows-frame*. A frame over a shaft, carrying the pulleys for the hoisting cables.

*Gang*. 1. A mine. 2. A set of miners.

*Gangue*. The mineral associated with the ore in a vein.

*Gangway*. 1. A main level, applied chiefly to coal mines. 2, NEWC. A wooden bridge.

*Garland*, S. STAFF. A trough or gutter round the inside of a shaft to catch the water running down the sides.

*Gas-coal*. See *Coal*.

*Gash*. Applied to a vein wide above, narrow below, and terminating in depth within the formation it traverses.

*Gas-well*. A deep boring, from which natural gas is discharged.

*Gate*, *Gate-way*, or *Gate-road*, ENG. 1. A road or way underground for air, water, or general passage; a *gangway*. 2. The aperture in a founder's mould, through which the molten iron enters.

*Gear*, NEWC. 1. The working tools of a miner. 2. The mechanical arrangements connecting a motor with its work.

*Geode*. A cavity, studded around with crystals or mineral matter, or a rounded stone containing such a cavity.

*Geological formations*. Groups of rocks of similar character and age are called formations. The different stratified formations have been arranged by geologists according to their apparent age or order of position stratigraphically, and the fossils they contain. While there are minor points of difference in classification, and still more in nomenclature, the general scheme is now well settled. Three tables are given below, the first prepared in 1878, by Professor J. D. Dana, the second by Professor T. Sterry Hunt, both for the United States, and the third, referring to formations found in Pennsylvania only, by Professor J. P. Lesley. [The latter is omitted.—EDITOR]. They are taken (Professor Hunt's, with later revision by the author), from *The Geologist's Traveling Handbook*, prepared by James Macfarlane, Ph.D. The numbers attached to the different formations in these tables will facilitate the identification of a given formation under different names. A catalogue of the formations is added to the tables, in which the predominant rocks of each are named. The eruptive rocks are not included in these tables, the determination of their age being a more difficult and doubtful matter, the discussion of which cannot be undertaken in this place. For lack of space, also, the enumeration and description of the different species of rocks and minerals must be omitted, the reader being referred for such information to works on lithology and mineralogy.

## PROFESSOR J. D. DANA'S TABLE OF GEOLOGICAL FORMATIONS.

| SYSTEMS OR AGES. | | GROUPS OR PERIODS. | FORMATIONS OR EPOCHS. |
|---|---|---|---|
| Age of man. | | 20. Quaternary. | 20. Quaternary. |
| Age of mammals. | | 19. Tertiary. | 19 c. Pliocene.<br>19 b. Miocene.<br>19 a. Eocene. |
| Reptilian age. | | 18. Cretaceous. | 18 c. Upper Cretaceous.<br>18 b. Middle Cretaceous.<br>18 a. Lower Cretaceous. |
| | | 17. Jurassic. | 17. Jurassic. |
| | | 16. Triassic. | 16. Triassic. |
| Carboniferous. | | 15. Permian. | 15. Permian. |
| | | 14. Carboniferous. | 14 c. Upper Coal Measures.<br>14 b. Lower Coal Measures.<br>14 a. Millstone Grit. |
| | | 13. Subcarboniferous. | 13 b. Upper Subcarboniferous.<br>13 a. Lower Subcarboniferous. |
| Devonian, or age of fishes. | | 12. Catskill. | 12. Catskill. |
| | | 11. Chemung. | 11 b. Chemung.<br>11 a. Portage. |
| | | 10. Hamilton. | 10 c. Genesee.<br>10 b. Hamilton.<br>10 a. Marcellus. |
| | | 9. Corniferous. | 9 c. Corniferous.<br>9 b. Schoharie.<br>9 a. Cauda Galli. |
| SILURIAN OR AGE OF INVERTEBRATES. | Upper Silurian. | 8. Oriskany. | 8. Oriskany. |
| | | 7. Lower Helderberg. | 7. Lower Helderberg. |
| | | 6. Salina. | 6. Salina. |
| | | 5. Niagara. | 5 c. Niagara.<br>5 b. Clinton.<br>5 a. Medina. |
| | Lower Silurian. | 4. Trenton. | 4 c. Cincinnati.<br>4 b. Utica.<br>4 a. Trenton. |
| | | 3. Canadian. | 3 c. Chazy.<br>3 b. Quebec.<br>3 a. Calciferous. |
| | | 2. Primordial or Cambrian. | 2 b. Potsdam.<br>2 a. Acadian. |
| | | 1. Archæan. | 1 b. Huronian.<br>1 a. Laurentian. |

## PROFESSOR T. STERRY HUNT'S TABLE OF GEOLOGICAL FORMATIONS.

| AGES. | GROUPS. | AMERICAN FORMATIONS. |
|---|---|---|
| Cenozoic. | 20. Quaternary. | 20. Recent. |
| | 19. Tertiary. | 19 c. Pliocene.<br>19 b. Miocene.<br>19 a. Eocene. |
| Mesozoic. | 18. Cretaceous.<br>17. Jurassic.<br>16. Triassic. | 18. Cretaceous.<br>17. New Red Sandstone.<br>16. New Red Sandstone. |
| Paleozoic. | 13–15, Carboniferous. | 15. Permo-Carboniferous.<br>14. Coal Measures.<br>13 b. Mississippi (Carb. Limestone).<br>13 a. Waverley or Bonaventure. |
| | 8–12. Erian or Devonian. | 12. Catskill.<br>11. Chemung and Portage.<br>10. Hamilton (including Genesee and Marcellus).<br>9. Corniferous or Upper Helderberg.<br>8. Oriskany. |
| | 5–7. Silurian. | 7. Lower Helderberg.<br>6. Onondaga or Salina.<br>5 c. Niagara (including Guelph).<br>5 b. Clinton.<br>5 a. Medina.<br>5 a. Oneida. |
| | 4. Upper Cambrian, Siluro-Cambrian, Ordovician, or Ordovian. | 4 c. Loraine.<br>4 b. Utica.<br>4 a. Trenton. |
| | 3. Middle Cambrian. | 3 c. Chazy.<br>3 b. Levis (Tremadoc and Arenig).<br>3 a. Calciferous. |
| | 2. Lower Cambrian. | 2 e. Potsdam.<br>2 d. Sillery.<br>2 c. Acadian (Menevian).<br>2 b. Taconian.<br>2 a. Keweenian. |
| Eozoic. | 1. Primary or Crystalline. | 1 e. Montalban.<br>1 d. Norian or Labrador.*<br>1 c. Huronian.<br>1 b. Arvonian.<br>1 a. Laurentian. |

* Professor Hunt says there are many reasons for believing that the Norian may be older than the Arvonian and Huronian.

NOTES.—In the following notes Professor Hunt's classification is sufficiently followed to show the nature of the older groups which he distinguishes:

1 a. *Laurentian.* Chiefly massive gneiss, reddish or grayish, sparingly micaceous, often hornblendic. Some crystalline limestone, magnetic iron, and other metallic ores.

1 b. *Arvonian.* Chiefly petrosilex, often becoming quartziferous prophyry, with some quartzites and hornblendic rocks; magnetic and specular iron ores.

1 c. *Norian.* Chiefly a feldspathic rock (norite), which sometimes carries garnet, epidote, etc.; also, great beds of titaniferous iron ores.

1 d. *Huronian.* Chloritic schists, greenstone (diorite or diabase), serpentine, steatite, dolomite, copper, chrome, nickel, and iron ore.

1 e. *Montalban.* Fine-grained micaceous or hornblendic gneiss, chrysolite rock, serpentine, mica-schist, granite.

2 a. *Keweenian.* The copper-bearing series of Lake Superior, made up of sandstones and conglomerates, with much interstratified eruptive rock.

2 b. *Taconian.* Granular quartzites, argillites and nacreous or hydro-micaceous schists, and great masses of crystalline limestone, marbles, magnetite, siderite, and pyrite changing to limonite.

2 c and 2 d. *Acadian* (and *Sillery*). Fossiliferous sandstone and shale.
2 e. *Potsdam*. Sandstone, conglomerate.
3 a. *Calciferous*. Sandy magnesian limestone, calcareous sandstone.
3 b. *Quebec*. Sandstone, limestone conglomerate, black slate.
3 c. *Chazy*. Limestone, chert.
4 a. *Trenton*. Limestone, buff and blue; dolomite carrying lead-ore deposits; brown-hematite beds.
4 b. *Utica*. Dark carbonaceous slate; impure limestone.
4 c. *Hudson River*. Slate, shale, clay, grit.
5 a. *Medina*. Conglomerate; argillaceous sandstone.
5 b. *Clinton*. Sandstone, shale, conglomerate, limestone, fossiliferous red hematite, or oolitic iron-ore bed.
5 c. *Niagara*. Clay shale; limestone.
6. *Salina*. Red shale, gypseous shale, hydraulic lime, salt.
7. *Lower Helderberg*. Limestone, shaly or compact, and fossiliferous.
8. *Oriskany*. Sandstone.
9. *Corniferous or Upper Helderberg*. Principally limestone.
9 a. *Cauda-galli*. Fine-grained calcareous and argillaceous, drab or brownish sandstone; peculiar fossils.
9 b. *Schoharie Grit*. Fine-grained calcareous grit, similar to 9 a, but with differing fossils.
9 c. *Onondaga*, and 9 d. *Corniferous*. Gray, blue, black limestone. At the top of 9 d occur the Marcellus iron ores (carbonate).
10 a. *Marcellus*. Black or dark-brown bituminous and pyritiferous shales. In 10 a and 9 d occur the petroleum deposits of Canada.
10 b. *Hamilton*. Slate, shale, sandstone, calcareous, and argillaceous.
10 b. *Tully*. Impure dark limestone.
10 c. *Genesee*. Black clay slate.
11 a. *Portage*. Green and black sandy and slaty shales, sandstone, flagstone.
11 b. *Chemung*. Thin-bedded greenish sandstones and flagstones, with intervening shales, and rarely beds of impure limestone.
12. *Catskill*. Red, gray sandstone, grindstone grit, greenish shale, conglomerate.
13 a. *Lower Subcarboniferous*. Sandstone, limestone, small local coal beds.
13 b. *Upper Subcarboniferous*. Red shale, red and gray sandstone, blue limestone.
14 a. *Millstone Grit*. White or yellow sandstone, and conglomerate of quartz pebbles.
14 b and 14 c. *Coal Measures*. Fire-clay, shale, sandstone, conglomerate, limestone, bituminous coal, anthracite, iron ore, salt.
15. *Permian*. Limestone, sandstone, marl, shale.
16. *Triassic*. Red sandstone, red shale, conglomerate, lignite, trap dikes, copper ore, coal.
17. *Jurassic*. Marl, limestone, probably the gold-bearing slates of California.
18. *Cretaceous*. Earthy beds of sand, marl, clay, limestone, chalk, lignite.
19. *Tertiary*. Earthy sand, clay, marl, limestone, sandstone.
20. *Quaternary*. Sand, pebbles, boulders, clay, diluvium, alluvium; gravel and placer tin and gold deposits.

NOTE.—The primary and crystalline schistose rocks contain the larger number of mineral veins. The ancient magnesian limestones (probably Devonian) are characterized in many localities by deposits of argentiferous lead ore and of zinc ore.

*Geordie*. The miners' term for Stephenson's safety-lamp.

*Gig*. See *Kibble*.

*Gin*. See *Whim*.

*Ginging*, DERB. The lining of a shaft with masonry.

*Giraffe*. A car of peculiar construction to run on an incline.

*Girdle*. A thin bed of stone.

*Girdle*, NEWC. A thin stratum of stone.

*Girth*. In *square-set* timbering, a horizontal brace in the direction of the *drift*.

*Glist*, CORN. Mica.

*Glut*, NEWC. A piece of wood, used to fill up behind *cribbing* or *tubbing*.

*Goaf*, ENG. An excavated space; also, the waste rock packed in old workings.

*Goaves*. Old workings.

*Gob*, S. WALES. See *Goaf*. Both terms are chiefly used in collieries, and are apparently the same word. Local usage seems to give to *goaf* rather the meaning of the space in which the roof has fallen after the *pillars* have been removed, and to *gob* that of a space packed with waste after *long-wall* extraction of the coal.

*Gobbing*. Packing with waste rock. See *Stowing*.

*Gob-fire*. Fire produced by the heat of decomposing *gob*.

*Goffan* or *Goffen*, CORN. A long, narrow surface-working.

*Gold-ores*. Native gold; *telluric gold ore* (*sylvanite*, *müllerite*, *nagyagite*, tellurides of gold, silver, and lead,); auriferous lead, zinc, and copper ores.

*Good levels*, CORN. Levels nearly horizontal.

*Gopher* or *Gopher-drift*. An irregular prospecting-drift, following or seeking the ore without regard to maintenance of a regular grade or section.

*Gossan* or *Gozzan*, CORN. Hydrated oxide of iron, usually found at the decomposed outcrop of a mineral vein.

*Gouge*. A layer of soft material along the wall of a vein, favoring the miner, by enabling him after "gouging" it out with a pick, to attack the solid vein from the side.

*Grain*, ENG. Of coal, the lines of structure or parting parallel with the main gangways, and hence crossing the *breasts*.

*Grain-tin*, CORN. 1. Crystalline tin ore. 2. Metallic tin.

*Granzas*, SP. Small pieces of ore.

*Graphite*. A crystalline form of carbon.

*Grapnel*. An implement for removing the core left by an annular drill in a bore-hole, or for recovering tools, fragments, etc., fallen into the hole.

*Grass*, CORN. The surface over a mine. *Bringing ores to grass* is taking them out of the mine.

*Grassero*, SP. A slag-heap.

*Grate*, CORN. See *Screen* (as applied to stamps).

*Grate coal*, PENN. See *Coal*.

*Gravel-mine*, U. S. An accumulation of auriferous gravel.

*Gray ore*, CORN. Copper-glance. See *Copper-ores*.

*Griddle*, CORN. A miner's sieve to separate ore from *halvans*.

*Grip*. A small, narrow cavity.

*Grizzly*, PAC. A grating to catch and throw out large stones from sluices.

*Groove* or *Grove*, DERB. A mine. From the GERM. *Grube*.

*Ground*, CORN. The rock in which a vein is found; also, any given portion of the mineral deposit itself.

*Growan*, CORN. Decomposed granite; sometimes the granite rock.

*Grueso*, SP. Lump ore. The term is in use at the quicksilver mines of California.

*Gubbin*. A kind of ironstone.

*Guides*. 1. The timbers at the side of a shaft to steady and guide the cage. 2. The holes in a cross-beam through which the stems of the stamps in a stamp-mill rise and fall.

*Guillotine*. A machine for breaking iron with a falling weight.

*Gullet*. An opening in the strata.

*Gunnies* or *Gunniss*, CORN. The vacant space left where the lode has been removed.

*Hacienda*, SP. Exchequer; treasury; public revenue; capital; funds; wealth; landed estate; establishment. In mining it is usually applied to the offices, principal buildings, and works for reducing the ores.

*Hack*. 1. See *Pick*. 2. A sharp blade on a long handle used for cutting billets in two.

*Hade*, DERB. See *Underlay*.

*Half-marrow*, NEWC. Young boys, of whom two do the work of one *putter*.

*Halvans*, CORN. Ores much mixed with impurities.

*Hammer-pick*. See *Pull-pick*.

*Hanging-coal*. A portion of the coal-seam which, by the removal of another portion, has had its natural support removed, as in *holing*.

*Hanging-guide*. See *Guide*.

*Hanging-side*, or *Hanging-wall*, or *Hanger*, CORN. The wall or side over the vein.

*Hasel*. Freestone.

*Head-gear*. That part of deep-boring apparatus which remains at the surface.

*Head-house*. See *Gallows-frame*.

*Heading*. 1. The vein above a drift. See *Back*. 2. An interior level or air-way driven in a mine. 3. In *long-wall* workings, a narrow passage driven upward from a gangway in starting a working, in order to give a *loose end*.

*Headings*. In ore-dressing, the heavier portions collecting at the upper end of a buddle or sluice, as opposed to the *tailings*, which escape at the other end, and the *middlings*, which receive further treatment.

*Head-piece*. See *Cap*.

*Headsman*, NEWC. See *Putter*.

*Head-stocks*. See *Gallows-frame*.

*Head-tree*, NEWC. See *Cap*.

*Headway*, NEWC. See *Cross-heading*. The *headways* are the second set of excavations in *post-and-stall* work.

*Heap*, NEWC. The refuse at the pit's mouth.

*Heave*, CORN. A horizontal dislocation of a vein or stratum.

*Hercules powder*. See *Explosives*.

*Hewer*, NEWC. The man who *cuts* the coal.

*High explosive.* An explosive or detonating compound developing more intense and instantaneous force than gunpowder. Most high explosives in general use contain nitro-glycerin. See *Explosives.*

*Hitch*, SCOT. and NEWC. 1. A minor dislocation of a vein or stratum not exceeding in extent the thickness of the vein or stratum. 2. A hole cut in the side-rock, when this is solid enought, to hold the *cap* of a set of timbers, permitting the *leg* to be dispensed with.

*Hog-back.* 1. A sharp anticlinal, decreasing in height at both ends until it runs out. 2. A ridge produced by highly tilted strata.

*Hogger-pipe.* The upper terminal pipe of the mining pump.

*Hogger-pump.* The topmost pump in a shaft.

*Holing.* 1. The working of a lower part of a bed of coal for bringing down the upper mass. 2. The final act of connecting two workings underground.

*Hopper.* 1. A trap at the foot of a *shoot* for regulating the contents of a wagon. 2. A place of deposit for coal or ore.

*Horn.* See *Spoon.*

*Horse*, CORN. A mass of country-rock inclosed in an ore-deposit.

*Horse-back*, NEWC. A portion of the roof or floor which bulges or intrudes into the coal.

*Horse-flesh ore*, CORN. Bornite. See *Copper-ores.*

*Horse-gin.* Gearing for hoisting by horse-power.

*Hotching*, NORTH ENG. See *Jigging.*

*House of Water*, CORN. A cavity or space filled with water.

*H-piece.* That part of a *plunger-lift* in which the valves or *clacks* are fixed.

*Hudge.* An iron bucket for hoisting ore or coal.

*Huel*, CORN. See *Wheal.*

*Hulk.* See *Dahu.*

*Hungry.* A term applied to hard barren vein-matter, such as white quartz (not discolored with iron oxide).

*Hurdy-gurdy wheel.* A water-wheel operated by the direct impact of a stream upon its radially-placed paddles.

*Hushing.* The discovery of veins by the accumulation and sudden discharge of water which washes away the surface soil and lays bare the rock. See *Booming.*

*Hutch.* 1. SCOT. A low car, suited both to run in a level and to be hoisted on a cage. 2. CORN. A cistern or box for washing ore. See *Jig*, in *Jigging.*

*Hydraulicking*, PAC. Washing down a hill-claim by the use of pipes, conveying water under high pressure.

*Impregnation.* An ore-deposit consisting of the country-rock impregnated with ore, usually without definite boundaries.

*Inbye* or *Inbyeside*, NEWC. Further into a mine, away from the shaft.

*Incline.* 1. A shaft not vertical; usually on the dip of a vein. See *Slope.* 2. A *plane*, not necessarily under ground.

*Indicator.* 1. An instrument for showing at any moment the position of the cage in the shaft. 2. An instrument for recording, by a diagram, upon a card, the varying pressure of the steam in the cylinder of a steam-engine during the stroke.

*Infiltration-theory.* The theory that a vein was filled by the infiltration of mineral solutions.

*Injection-theory.* The theory that a vein was filled first with molten mineral.

*In place.* Of rocks, occupying, relative to surrounding masses, the position that it had when formed.

*Intake.* The passage by which the ventilating current enters a mine. See *Downcast*, which is more appropriate for a shaft; *Intake* for an adit.

*Irestone* or *Ironstone*, CORN. Greenstone.

*Irestone.* Hard clay slate; hornstone; hornblende.

*Iron-hat.* See *Gossan.*

*Iron ores: Magnetic* (*magnetite*, protoperoxide), *specular* (*hematite* proper, *red hematite*, anhydrous peroxide), *brown iron ore* (*hematite*, *brown hematite*, *limonite*, etc., hydrated peroxides), *spathic* (*siderite*, carbonate), clay-ironstone (*black band*, argillaceous *siderite*). See *Fossil ore.*

*Ironstone.* 1. Iron-ore. 2. See *Irestone.*

*Jackhead-pit.* A small shaft sunk within a mine.

*Jackhead-pump.* A subordinate pump in the bottom of a shaft, worked by an attachment to the main pump-rod.

*Jack-roll*, NEWC. See *Windlass*.

*Jadding* or *Judding*. See *Holing*.

*Jagging*. A mode of carrying ore to the reduction-works in bags on horses, mules, etc.

*Jars*. A part of percussion-drilling apparatus for deep holes, which is placed between the *bit* and the *rods* or *cable*, and which by producing at each up-stroke a decided jar of the *bit* jerks it up, though it may be tightly wedged in the hole.

*Jig-brow*. See *Jinny-road*.

*Jig-chain*, S. STAFF.. A chain hooked to the back of a *skip* and running round a post, to prevent its too rapid descent on an inclined plane.

*Jigging*, CORN. Separating ores according to specific gravity with a sieve agitated up and down in water. The apparatus is called a *jig* or *jigger*.

*Jinny-road*. A gravity plane under ground.

*Jowl*, NEWC. A noise made for a signal by hammering at the faces of two levels expected to meet.

*Judd*, NEWC. In *whole working*, a portion of the coal laid out and ready for extraction; in *pillar working* (*i. e.*, the drawing or extraction of pillars), the yet unremoved portion of a pillar.

*Judge*, DERB. and NEWC. A measuring-stick to measure coal-work under ground.

*Jugglers*. Timbers set obliquely against pillars of coal, to carry a plank partition, making a triangular air-passage or man-way.

*Jump*. 1. PAC. To take possession of a mining claim alleged to have been forfeited or abandoned. 2. A dislocation of a vein.

*Jumper*, CORN. and NEWC. A drill or boring tool, consisting of a bar, which is "jumped" up and down in the bore-hole.

*Kann*. See *Cand*.

*Keckle-meckle*. The poorest kind of lead ore.

*Keeve*. 1. See *Cauf*. 2. A tub used in collecting grains of heavy ore or metal; a dolly tub.

*Kevil*, DERB. A veinstone, consisting of a mixture of carbonate of lime and other minerals.

*Kibbal* or *Kibble*, CORN. and WALES. An iron bucket for raising ore.

*Kicker*, Ground left in first cutting a vein, for support of its sides.

*Kieve*, CORN. A tub for *tozing* tin-ore.

*Killas*, CORN. Clay-slate.

*Kind's plug*. A wooden plug attached to an iron rod, used in connection with sand for recovering *tubing* from *bore-holes*.

*Kirving*, NEWC. The cutting made at the bottom of the coal by the *hewer*.

*Kit*. A wooden vessel.

*Knits* or *Knots*. Small particles of ore.

*Knockings*. See *Riddle*.

*Knots*. Small particles of ore.

*Labor*, SP. Labor; work; a working. This term is applied in mining to the work which is actually going on, and to the spaces which have been dug out. It includes galleries, cavities, and shafts.

*Lagging*. Planks, slabs, or small timber, placed over the caps or behind the posts of the timbering, not to carry the main weight, but to form a ceiling or a wall, preventing fragments of rock from falling through.

*Lander*, CORN. The man at the shaft-mouth who receives the *kibble*.

*Landry-box*, NEWC. A box at the top of a set of pumps, into which the water is delivered.

*Lane-skirting*, NEWC. Widening a passage by cutting coal from the side of it.

*Lath door-set*. A weak lath-frame surrounding a main *door-frame*, the space between being for the insertion of *spills*.

*Lath-frame* or *crib*. A weak lath-frame, surrounding a main *crib*, the space between being for the insertion of *piles*.

*Laths*, CORN. The *boards* or *lagging* put behind the *durns*.

*Launder*, CORN. A wooden trough, gutter or sluice.

*Lazadores*, SP. Persons employed to collect workmen for a mine.

*Lazyback*, S. STAFF. The place at the surface where coal is stacked for sale.

*Lead* (pronounced like the verb *to lead*), PAC. See *Lode*.

*Leader*, CORN. A small vein leading to a larger one.

*Lead-ores. Galena* (*galenite* sulphide); *antimonial lead-ore* (*bournonite*, sulphantimonide of lead and copper); *white-lead ore* (*cerussite*, carbonate); *green lead-ore* (*pyromorphite*, the phosphate, or *mimetite* or *mimetesite*, the arseno-chloride); *lead vitriol* (*anglesite*, sulphate); *yellow lead-ore* (*wulfemite*, molybdate); *red lead-ore* (*crocoite*, chromate).

*Lead-spar*, CORN. Anglesite. See *Lead-ores.*

*Leap*, DERB. A fault. See *Jump.*

*Leat*, CORN. A watercourse.

*Leath.* Applied to the soft part of a vein.

*Leavings*, CORN. The ores left after the *crop* has been removed.

*Ledge*, PAC. See *Lode.*

*Ledger-wall.* See *Foot-wall.*

*Leg.* A prop of timber supporting the end of a *stull*, or the *cap* of a set of timber.

*Level.* A horizontal passage or drift into or in a mine. It is customary to work mines by levels at regular intervals in depth, numbered in their order below the adit or drainage level, if there be one.

*Lewis.* An iron instrument for raising, heavy blocks of stone.

*Ley*, SP. Proportion of metal in the ore; fineness of bullion; also, an alloy or base metal.

*Lid.* A flat piece of wood placed between the end of a *prop* or *stempel* and the rock.

*Lifters*, CORN. The wooden beams used as *stems* for stamps in old-fashioned stamp-mills.

*Lifting-dog.* A claw-hook for grasping a column of bore-rods while raising or lowering them.

*Lignite.* See *Coal.*

*Limp.* An instrument for striking the refuse from the sieve in washing ores.

*Lining*, NEWC. See *Dialling.*

*Linnets*, DERB. Oxidized lead-ores.

*Lithofracteur.* See *Explosives.*

*Little Giant.* A jointed iron nozzle used in hydraulic mining.

*Loam.* An impure potter's clay, containing mica or iron ochre.

*Location.* 1. The act of fixing the boundaries of a mining claim, according to law. 2. The claim itself.

*Loch*, DERB. and WALES. See *Vugg.*

*Lock-timber.* An old plan of putting in *stull-pieces* in Cornwall and Devon. The pieces were called *lock-pieces.*

*Lode*, CORN. Strictly a fissure in the country-rock filled with mineral; usually applied to metalliferous lodes. In general miner's usage, a *lode*, *vein*, or *ledge* is a tabular deposit of valuable mineral between definite boundaries. Whether it be a fissure formation or not is not always known, and does not affect the legal title under the United States federal and local statutes and customs relative to lodes. But it must not be a placer, *i. e.*, it must consist of quartz or other rock *in place*, and bearing valuable mineral.

*Lodge*, WALES. See *Platt.*

*Log*, S. STAFF. A balance-weight near the end of the hoisting-rope of a shaft, to prevent its running back over the pulley.

*Long-tom*, PAC. A kind of gold-washing cradle.

*Long-wall.* A method of coal mining by which the whole seam is taken out as the working faces progress, and the roof is allowed to fall behind the workers, except where passages must be kept open, or where the *gob* being packed in the space formerly occupied by the coal, prevents caving. According as the work of extraction begins at the boundary of the *winning*, and converges back to the shaft, or begins with the coal nearest the shaft and proceeds outward to the boundaries, it is called *long-wall retreating* or *long wall advancing.*

*Loob* or *loobs*, CORN. The clayey or slimy portion washed out of tin-ore in *dressing.*

*Loop-drag.* An eye at the end of a rod through which tow is passed for cleaning bore-holes.

*Loose-end.* A gangway in *long-wall* working, driven so that one side is solid ground while the other opens upon old workings. See *Fast-end.*

*Lorry.* A hand car used on mine tramways.

*Lost level*, CORN. "Level" is "lost" when a gallery has been driven with an unnecessarily great departure from the horizontal.

*Lowe*, NEWC. A light. A "piece of lowe" is part of a candle.

*Lum*. A chimney over an upcast pit.

*Lump-coal*, PENN. See *Coal*.

*Lying-wall*. See *Foot-wall*.

*Machine-whim*. A rotary steam-engine for winding.

*Magistral*, SP. A powder of roasted copper pyrites, used in the amalgamation of silver ores.

*Main-rod*, CORN. See *Pump-rod*.

*Mainway*. A *gangway* or principal passage.

*Makings*, NEWC. The small coals hewn out in *kirving*.

*Mallet*, CORN. The sledge-hammer used for striking or *beating* the *borer*.

*Mandril*. See *Maundril*.

*Manganese-ores*. *Gray oxide* (*pyrolusite polianite*, anhydrous peroxide, and *manganite*, hydrated sesquioxide); *black manganese* (*hausmannite*, protoperoxide); *braunite* (anhydrous sesquioxide); *red manganese ore* (*rhodochrosite*, a carbonate, or *rhodonite*, a silicate); also, manganiferous iron ores.

*Man-hole*, CORN. The hole in a *sollar* through which men pass upon the ladder or from one ladder to the next.

*Man-machine* or *Man-engine*, CORN. and DERB. A mechanical lift for lowering and raising miners in a shaft, by means of a reciprocating vertical rod of heavy timber with platforms at intervals, or of two such rods, moving in opposite directions. In the former case, stationary platforms are placed in the shaft, so that the miner in descending, for instance, can step from the moving platform at the end of the down-stroke, and step back upon the next platform below at the beginning of the next downstroke. When two rods are employed, the miner steps from the platform on one rod to that on the other.

*Man-of-war*, STAFF. A small pillar of coal left in a critical spot; also, a principal support in thick coal workings.

*Manta*, SP. Blanket; sack of ore.

*Manway*. A small passage, used by workmen, but not for transportation.

*Maquilla*, SP. A mill where ore is ground on shares.

*Marl*. Calcareous clay, sometimes used for the hearths of cupelling-furnaces.

*Mass-copper*, LAKE SUP. Native copper, occurring in large masses.

*Matrix*. The rock or earthy material containing a mineral or metallic ore; the *gangue*.

*Maul*, DERB. A large hammer or mallet.

*Maundril*, DERB. and S. WALES, A prying *pick* with two prongs.

*Mear*, DERB. Thirty-two yards of ground measured on the vein.

*Measures*. Strata of coal, or the formation containing coal beds.

*Meat-earth*. The vegetable mould.

*Meetings*, NEWC. The place at middle-depth of a *shaft*, *slope* or *plane*, where ascending and descending cars pass each other.

*Merced*, SP. A gift. This term is applied to a grant which is made without any valuable consideration.

*Mercury-ores*. Native mercury; *cinnabar* (sulphide).

*Metal*, SP. 1. This term is applied both to the ore and to the metal extracted from it. It is sometimes used for vein, and even for a mine itself. *Metal en piedra*, ore in the rough state. *Metal ordinario*, common ore. *Metal pepena*, selected ore. *Metal de ayuda*, ore used to assist the smelting of other ores. 2. SCOT. All the rocks met with in mining ore. 3. *Road metal*, rock used in macadamizing roads.

*Mica-powder*. See *Explosives*.

*Mill*, ENG. 1. By common usage, any establishment for reducing ores by other means than smelting. More strictly, a place or a machine in which ore or rock is crushed. 2. An excavation made in the *country* rock, by a *cross-cut* from the workings on a vein, to obtain waste for *gobbing*. It is left without timber so that the roof may fall in and furnish the required rock. 3. CORN. A passage through which ore is shot underground. See *Pass* and *Shoot*.

*Mill-run*, PAC. 1. The work of an amalgamating mill between two *clean-ups*. 2. A test of a given quantity of ore by actual treatment in a mill.

*Mine*. 1. In general, any excavation for minerals. More strictly, subterranean workings, as distinguished from *quarries*, *placer* and *hydraulic* mines, and surface or open works. The distinction between the French terms *mine* and *minière* results entirely

from the law, and depends upon the depth of the working. The former is the more general term, and, ordinarily speaking, includes the latter, which signifies shallow or surface workings. 2. In a military sense, a mine is a subterranean gallery run under an enemy's works, to be subsequently exploded.

*Miner*, PENN. The workman who *cuts* the coal, as distinguished from the *laborer* who loads the wagons, etc.

*Mineral.* In miners' parlance, ore.

*Mineral caoutchouc.* Elastic bitumen.

*Mineral charcoal.* A pulverulent, lustreless substance, showing distinct vegetable structure, and containing a high percentage of carbon with little hydrogen and oxygen, occurring in thin layers in bituminous coal.

*Mineralised.* Charged or impregnated with metalliferous mineral.

*Mineral oil* or *Naphtha.* A limpid or yellowish liquid, lighter than water, and consisting of hydrocarbons. *Petroleum* is heavier than naphtha, and dark-greenish in color when crude. Both are exuded from the rocks; but naphtha can be distilled from petroleum.

*Mineral pitch.* Asphaltum.

*Mineral right.* The ownership of the minerals under a given surface, with the right to enter thereon, mine, and remove them. It may be separated from the surface ownership, but, if not so separated by distinct conveyance, the latter includes it.

*Mine-rent.* The rent or royalty paid to the owner of a mineral right by the operator of the mine—usually dependent, above a fixed minimum, upon the quantity of product.

*Mineria*, SP. Mining. This term embraces the whole subject, including both mines and miners, and also the operations of wokring mines and of reducing their ores. It, however, is often used in a more restricted sense.

*Minero*, SP. Miner. This term is not limited to those who work mines, but includes their owners, and all who have the qualifications prescribed in the ordinances, and are enrolled as members of the body or craft. Many of the laborers who work in mines are not, technically speaking, miners. This term is sometimes used in the old laws for *mine.*

*Miners' inch*, PAC. A local unit for the measurement of water supplied to hydraulic miners. It is the amount of water flowing under a certain head through one square inch of the total section of a certain opening, for a certain number of hours daily. All these conditions vary at different localities. At Smartsville, Cal., the discharge opening is a horizontal slit, 4 inches wide, in a 2-inch plank, with the standing head of water in the feed-box 9 inches above the middle of the slit. Each square inch of this opening will discharge 1.76 cubic feet per minute. A miners' inch in use in El Dorado county, Cal., discharges 1.39 cubic feet per minute. At North Bloomfield, Cal., and other places, the discharge is 50 inches long by 2 wide (giving 100 miners' inches) through a 3-inch plank, with the water 7 inches above the centre of the opening. Each inch is 1.50 to 1.57 cubic feet per minute in practice, or 59.05 to 61.6 per cent. of the theoretical discharge. These figures are taken from the paper of A. J. Bowie, jr., on "Hydraulic Mining in California," *Trans. Am. Inst. M. E.*, vol. vi, p. 59.

*Mineta*, SP. A little mine; a chamber, or cavity.

*Mispickel*, GERM. Arsenical pyrites.

*Mistress*, NEWC. A lantern used in coal mines.

*Mobby*, S. STAFF. A leathern girdle, with small chain attached, used by the boys who draw *bowkes.*

*Mock-lead*, CORN. Zincblende.

*Moil* or *Moyle*, CORN. A drill pointed like a *gad.*

*Monitor*, PAC. A kind of nozzle used in *hydraulicking.*

*Monkey-drift.* A small prospecting drift.

*Monoclinal.* Applied to any limited portion of the earth's crust throughout which the strata dip in the same direction.

*Moorstone*, CORN. Loose masses of granite found in Cornish moors.

*More*, CORN. A quantity of ore in a particular part of a lode, as a *more* of tin.

*Mortar.* 1. A heavy iron vessel, in which rock is crushed by hand with a pestle, for sampling or assaying. 2. The receptacle beneath the stamps in a stamp mill, in which the dies are placed, and into which the rock is fed to be crushed.

*Mote.* See *Squibb.*

*Mothergate*, NEWC. The main passage in a district of workings.

*Mountain limestone.* The English designation of a limestone of the lower part of the carboniferous age; called also subcarboniferous limestone.

*Mouth*. The end of a shaft or adit emerging at the surface.

*Mucks*, S. STAFF. See *Smut*.

*Muller*. The stone or iron in an *arrastre* or grinding or amalgamating pan, which is dragged around on the bed to grind and mix the ore-bearing rock.

*Mun*, CORN. Any fusible metal.

*Mundic*, CORN. Iron pyrites. White *mundic* is *mispickel*.

*Narrow work*. The driving of *gangways* or *airways*; also, any *dead work*.

*Nasmyth hammer*. A steam-hammer, having the head attached to the piston-rod, and operated by the direct force of the steam.

*Native*. Occurring in nature; not artificially formed. Usually applied to the metals.

*Nays*, CORN. See *Nogs*.

*Needle* or *Nail*, CORN. A copper or copper-pointed implement, placed in a bore-hole during charging, to make, by its withdrawal, an aperture for the insertion of the *rush* or train.

*Negrillo*, SP. A silver-ore; black sulphuret of silver.

*Neptune powder*. See *Explosives*.

*Niccoliferous* or *Nickeliferous*. Containing nickel.

*Nickel ores*. *Copper-nickel* (*niccolite*, arsenide of nickel); *antimonial nickel* (*breithauptite*, antimonide); *white nickel* (*rammelsbergite*, binarsenide); *nickel pyrites* (*pentlandite*, sulphide of nickel and iron, *millerite*, sulphide); *nickeliferous gray antimony* (*ullmannite*, arsenantimonide); *nickeliferous serpentine* (*refdanskite*, hydrous magnesian silicate); also, niccoliferous ores of copper, cobalt, manganese, etc.

*Nicking*, NEWC. The cutting made by the *hewer* at the side of the *face*. *Nickings* is the small coal produced in making the nicking.

*Nicking-trunk*. A tub in which metalliferous slimes are washed.

*Nip*, NEWC. 1. A crush of pillars or workings. 2. See *Pinch*.

*Nipping-fork*. A tool for supporting a column of bore-rods while raising or lowering them.

*Nitroglycerin*. See *Explosives*.

*Nittings*. The refuse of good ore.

*Noble metals*. The metals which have so little affinity for oxygen (*i. e.*, are so highly electro-negative) that their oxides are reduced by the mere application of heat without a reagent; in other words, the metals least liable to oxidation under ordinary conditions. The list includes gold, silver, mercury, and the platinum group (including palladium, iridium, rhodium, ruthenium, and osmium). The term is of alchemistic origin.

*Noddle* or *Nodule*. A small rounded mass.

*Noger*. A *jumper* drill.

*Nogs*, DERB. and CORN. Square blocks or logs of wood, piled on one another to support a mine roof.

*Nose-helve*, ENG. See *Frontal hammer*.

*Nuts*. Small coal.

*Ochre*. A term applied to metallic oxides occurring in an earthy, pulverulent condition, as iron ochre, molybdic ochre.

*Oil-well*. A dug or bored well, from which petroleum is obtained by pumping or by natural flow.

*Old man*. Ancient workings; *goaves*.

*Old men*. The persons who worked a mine at any former period of which no record remains.

*Open cast*, SCOT. See *Open cut*.

*Open-crib timbering*. Shaft timbering with *cribs* alone, placed at intervals.

*Open cut*. A surface-working, open to daylight.

*Openings*. The parts of coal mines between the pillars, or the pillars and ribs.

*Opens*. Large caverns.

*Open-work*. A quarry or *open cut*.

*Operator*, PENN. The person, whether proprietor or lessee, actually operating a colliery.

*Ore*. 1. A natural mineral compound, of which one at least of the elements is a metal. The term is applied more loosely to all metalliferous rock, though it contain the metals in a free state, and occasionally to the compounds of non-metallic substances, as *sulphur ore*. 2. CORN. Copper ore; tin ore being spoken of in Cornwall as *tin*.

*Ore-washer*. A machine for washing clay and earths out of earthy brown-hematite ores.

*Outbye* or *Outbyeside*, NEWC. Nearer to the shaft, and hence further from the *fore-winning*.

*Outcrop*. The portion of a vein or stratum emerging at the surface, or appearing immediately under the soil and surface-*débris*.

*Outlet*. The passage by which the ventilating current goes out of a mine. See *Upcast*.

*Output*. The product of a mine.

*Overburden*. 1. CORN. See *Burden* (1). 2. The waste which overlies the good stone in a quarry.

*Overman*, ENG. The mining official next in rank below the *manager*, who is next below the *agent*.

*Pack*. A wall or pillar built of *gob* to support the roof.

*Pair* or *Pare*, CORN. Two or more miners working in common.

*Pan*. 1. See *Panning*. 2. A cylindrical vat of iron, stone, or wood, or these combined, in which ore is ground with *mullers* and amalgamated. See *Amalgamation*.

*Pane*. The striking-face of a hammer.

*Panel*. 1. A heap of dressed ore. 2. A system of coal-extraction in which the ground is laid off in separate districts or panels, pillars of extra size being left between.

*Panning*, AUST. and PAC. Washing earth or crushed rock in a pan, by agitation with water, to obtain the particles of greatest specific gravity which it contains (chiefly practiced for gold, also for quicksilver, diamonds, and other gems).

*Parachute*. 1. A kind of *safety-catch* for shaft cages. 2. In rod-boring, a *cage* with a leather cover to prevent a too rapid fall of the rods in case of accident.

*Parcel*, CORN. A heap of dressed ore ready for sale.

*Parrot-coal*, SCOT. See *Coal*.

*Parting*. A small joint in coal or rock, or a layer of rock in a coal seam.

*Pass*, CORN. An opening in a mine through which ore is shot from a higher to a lower level. See *Shoot*.

*Pavement*. The *floor* of a mine.

*Pay-streak*. The zone in a vein which carries the profitable or *pay* ore.

*Peach*, CORN. Chlorite.

*Pea-coal*, PENN. See *Coal*.

*Percussion-table*. An inclined table, agitated by a series of shocks, and operated at the same time like a *buddle*. It may be made self-discharging and continuous by substituting for the table an endless rubber cloth, slowly moving against the current of water, as in the *Frue vanner*.

*Pertinencia*, SP. The extent of a mining location in Mexico, to which a title is acquired by denunciation.

*Peter* or *Peter out*. To fail gradually in size, quantity or quality.

*Pick*. A pick-axe with one or two points. The usual miners' pick has but one.

*Picker* or *Poker*. A hand chisel for *dshuing*, held in one hand and struck with a hammer.

*Pick-hammer*, A hammer with a point, used in cobbing.

*Pike*. See *Pick*.

*Piking*. See *Cobbing*.

*Piles*. Long thick laths, etc., answering in shafts, in loose or "quick" ground, the same purpose as *spills* in levels, *piles* being driven vertically.

*Pillar-and-stall*. See *Post-and-stall*.

*Pinch*, CORN. To contract in width.

*Pipe* or *Pipe-vein*, DERB. An ore-body of elongated form.

*Pipe-clay*, U. S. A fine clay found in hydraulic mines.

*Pipe-ore*. Iron ore (limonite) in vertical pillars, sometimes of conical, sometimes of hour-glass form, imbedded in clay. Probably formed by the union of stalactites and stalagmites in caverns.

*Piping*, PAC. 1. See *Hydraulicking*. 2. The tubular depression caused by contraction during cooling, on the top of iron or steel ingots.

*Pit*. A shaft.

*Pitch*, CORN. 1. The limits of the *set* to tributers. 2. The inclination of a vein, or of the longer axis of an ore-body.

*Pitch-bag*, CORN. A bag covered with pitch, in which powder is inclosed for charging damp holes.

*Pit-coal*. See *Coal*.

*Pit-eye*, ENG. The bottom of the shaft of a coal-mine; also the junction of a shaft and a level.

*Pit-eye pillar*. A barrier of coal left around a shaft to protect it from caving.

*Pit-frame*. The framework carrying the pit-pulley.

*Pitman*. 1. CORN. A man employed to examine the lifts of pumps and the drainage. 2. NEWC. A working miner.

*Pitwork*, CORN. The pumps and other apparatus of the engine shaft.

*Place*. See *In place*.

*Placer*, SP. A deposit of valuable mineral, found in particles in *alluvium* or *diluvium*, or beds of streams, etc. Gold, tin-ore, chromic iron, iron-ore and precious stones, are found in placers. By the United States Revised Statutes, all deposits not classed as veins of rock in place are considered placers.

*Plane*. An incline, with tracks, upon which materials are raised in cars by means of stationary engine, or are lowered by gravity.

*Plank-timbering*. The lining of a shaft with rectangular plank frames.

*Plank-tubbing*. The lining of a shaft with planks, spiked on the inside of *curbs*.

*Plat*. The map of a survey in horizontal projection.

*Plate-shale*. A hard argillaceous bed.

*Platinum-ores*. Mixtures of native platinum in grains with various other metals and minerals.

*Platt*, CORN. An enlargement of a level near a shaft, where ore may await hoisting, wagons pass each other, etc.

*Plomo*, SP. Lead. *Plomo-plata*, lead-silver.

*Plug*. A hammer closely resembling the *bully*.

*Plumb*. 1. Vertical. 2. Soft.

*Plumbago*. Graphite.

*Plunger*. The piston of a force-pump.

*Plush-copper*. Chalcotrichite, a fibrous red copper ore.

*Pocket*. 1. A small body of ore. 2. A natural underground reservoir of water. 3. A receptacle, from which coal, ore or waste is loaded into wagons or carts.

*Podar*. See *Mundic*.

*Pointed boxes*. Boxes in the form of inverted pyramids or wedges, in which ores, after crushing and sizing, are separated in a current of water.

*Pole-tools*. The tools used in drilling with rods. See *Cable-tools*.

*Polings*. Poles used instead of planks for *lagging*.

*Poll*, CORN. The head or striking part of a miner's hammer.

*Poll-pick*. A *pick* with a head for breaking away hard *partings* in coal-seams or knocking down rock already seamed by *blasting*.

*Polros*, pronounced *Polrose*, CORN. The pit underneath a water-wheel.

*Poppet-heads*, CORN. A timber frame over a shaft to carry the hoisting pulley.

*Post*. 1. A pillar of coal or ore. 2. An upright timber.

*Post-and-stall*. A mode of working coal, in which so much is left as pillar and so much is taken away, forming *grooms* and *thirlings*. The method is called also *bord-and-pillar*, *pillar-and-breast*, etc.

*Potstone*. Compact steatite.

*Potter's clay* and *Pipe-clay*. Pure plastic clay, free from iron, and consequently white after burning.

*Power-drill*. See *Rock-drill*.

*Precious metals*. See *Noble metals*.

*Prian*, CORN. Soft white clay.

*Pricker*. See *Needle*.

*Prill*, CORN. 1. The best ore after cobbing. 2. See *Button*.

*Pringap*. The distance between two mining possessions in Derbyshire.

*Produce*. 1. The marketable ores or minerals produced by mining and *dressing*. 2. CORN. The amount of fine copper in one hundred parts of ore.

*Prop*. A timber set to carry a roof or other weight acting by compression in the direction of the axis.

*Prop-crib timbering*. Shaft-timbering with *cribs* kept at the proper distance apart by means of *props*.

*Prospecting*. Searching for new deposits; also, preliminary explorations to test the value of lodes or placers. The *prospect* is good or bad.

*Proving-hole*. A small *heading* driven to find and follow a coal-seam, lost by dislocation.

*Pryan.* Ore in small pebbles mixed with clay.

*Pudding-stone.* A conglomerate in which the pebbles are rounded. See *Breccia.*

*Pug-tub.* See *Settler.*

*Pulley-frame.* See *Gallows-frame.*

*Pulp,* PAC. Pulverized ore and water; also applied to dry-crushed ore.

*Pulp-assay,* PAC. The assay of samples taken from the *pulp* after or during crushing.

*Pump-bob.* See *Bob.*

*Pump-rod.* The rod or system of rods (usually heavy beams) connecting the steam-engine at the surface, or at a higher level, with the pump-piston below. See *Balance-bob.*

*Pump-station.* See *Station.*

*Punch* or *Puncheon.* See *Leg.*

*Punch-prop,* NEWC. A short *prop.*

*Put,* NEWC. To convey coal from the working *breast* to the tramway. This is usually done by young men (*putters*).

*Put-work.* See *Tut-work.*

*Quarry.* An open or "day" working, usually for the extraction of building-stone, slate or limestone.

*Quartz.* 1. Crystalline silica. 2. PAC. Any hard gold or silver ore, as distinguished from gravel or earth. Hence *quartz-mining,* as distinguished from hydraulic, etc.

*Quartzose.* Containing quartz as a principal ingredient.

*Quere, queere* or *qweear,* CORN. A small cavity or fissure.

*Quick.* 1. Applied to a productive vein as distinguished from *dead* or barren. 2. PAC. Quicksilver.

*Quick ground.* Ground in a loose, incoherent state.

*Quicksand.* Sand which is (or becomes, upon the access of water), "quick," *i. e.,* shifting, easily movable or semi-liquid.

*Quicksilver-ores.* See *Mercury-ores.*

*Quintal.* One hundred pounds avoirdupois.

*Race.* A small thread of spar or ore.

*Rack,* CORN. A stationary *buddle.*

*Rafter-timbering.* Timbering in which the pieces are arranged like the rafters of a house.

*Rag-burning,* CORN. See *Tin-witts.*

*Ragging.* A rough *cobbing.*

*Raise.* See *Rise.*

*Rake,* DERB. A fissure vein crossing the strata.

*Raking-prop.* An inclined *prop.*

*Ramble,* NEWC. A shale bed on the top of a coal seam, which falls as the coal is removed.

*Rancho,* SP. An estate or property; a farm.

*Random.* The direction of a *Rake-vein..*

*Rapper.* A level or hammer at the top of a shaft or inclined plane, for signals from the bottom.

*Reamer.* A tool for enlarging a bore-hole.

*Record.* To enter in the book of the proper officer (usually a district or county officer) the name, position, description, and date of a mining claim or location. See *District.*

*Redevance,* FR. A tax, duty, or rent. In mining law it means a tax or duty payable to the government or to the surface owner.

*Reed,* CORN. See *Spire.*

*Reef,* AUSTR. See *Lode.*

*Rend-rock.* See *Explosives.*

*Renk,* NEWC. The average distance coal is brought by the *putters.*

*Rests.* The arrangement at the top and bottom of a pit for supporting the shaft-cage while changing the tubs or cars.

*Retorting.* Removing the mercury from an amalgam by volatilizing it in an iron retort, conducting it away, and condensing it.

*Rib.* 1. In coal mining, the solid coal on the side of a gallery or long-wall face; a pillar or barrier of coal left for support. 2. The solid ore of a vein; an elongated pillar left to support the hanging-wall, in working out a vein.

*Ribbed.* Containing *bone.*

*Ribbon-borer.* A boring-tool consisting of a twisted flat steel blade.

*Riddle*, CORN. and SCOT. A sieve. The large pieces of ore and rock picked out by hand are called *knockings*. The *riddlings* remain on the riddle; the *fell* goes through.

*Rider.* See *Horse.*

*Riffle.* A groove or interstice, or a cleat or block so placed as to produce the same effect, in the bottom of a sluice, to catch free gold.

*Rim-rock.* The bed-rock rising to form the boundary of a placer or gravel deposit.

*Ring*, NEWC. A gutter cut around a shaft to catch and conduct away the water.

*Ringe.* See *Cowl.*

*Rise* or *Riser*, CORN. A shaft or winze excavated upward.

*Rise-heading.* See *Heading, in long-wall.*

*Rivelaine.* A pick with one or two points, formed of flat iron, used to undercut coal by scraping instead of striking.

*Rob.* To extract pillars previously left for support; or, in general, to take out ore or coal from a mine with a view to immediate product, and not to subsequent working.

*Rock-breaker.* Usually applied to a class of machines, of which Blake's rock-breaker is the type, and in which the rock is crushed between two jaws, both movable, or one fixed and one movable. It is common to use a rock-breaker instead of hand-spalling to prepare ore for further crushing in the stamp-mill.

*Rock-drill.* A machine for boring in rock, either by percussion, effected by reciprocating motion, or abrasion, effected by rotary motion. Compressed air is the usual motive power, but steam also is used. The Burleigh, Haupt, Ingersoll, Wood, and other machines operate percussively; the *diamond drill* (which see) abrasively.

*Rocker.* A short trough in which auriferous sands are agitated by oscillation in water, to collect their gold.

*Rod-tools.* See *Pole-tools.*

*Rolley.* A large truck carrying two *corves.*

*Rolley-way.* A *gangway.*

*Roof.* The rock overlying a bed or flat vein.

*Roofing.* The wedging of a loaded wagon or horse against the top of an underground passage.

*Room*, SCOT. See *Breast* and *Post-and-stall.*

*Roughs*, CORN. Coarse, poor sands, resulting from tin-dressing.

*Round coal.* See *Lump coal.*

*Rounder.* See *Reamer.*

*Row*, CORN. Large, rough stones.

*Royalty.* The dues of a lessor or landlord of a mine, or of the owner of a patented invention.

*Rubber.* A gold-quartz amalgamator, in which the slime is rubbed against amalgamated copper surfaces.

*Rullers*, CORN. The workmen who wheel ore in wheelbarrows underground.

*Run*, CORN. 1. The natural falling or closing together of underground workings. 2. Certain accidents to the winding apparatus. 3. *By the run.* A method of paying coal miners per linear yard of breast excavated, instead of *by the wagon* of clear coal produced. 4. A long deep trough in which slimes settle. 5. See *Counter.*

*Rush*, CORN. See *Spire.*

*Rusty.* Applied to coals discolored by water or exposure, as well as to quartz, etc., discolored by iron oxide.

*Rusty gold*, PAC. Free gold, which does not easily amalgamate, the particles being coated, as is supposed, with oxide of iron.

*Saddle.* An anticlinal in a bed or flat vein.

*Safety-cage.* A cage with a *safety catch.*

*Safety car.* See *Barney.*

*Safety-catch.* An automatic device for preventing the fall of a cage in a shaft, or a car in an incline, if the supporting cable breaks.

*Safety-lamp.* A lamp, the flame of which is so protected that it will not immediately ignite fire-damp. There are several varieties, invented by Davy, Stephenson, Clanny, and others.

*Saline.* A salt spring or well; salt works.

*Sampson-post.* An upright post which supports the walking-beam, communicating motion from the engine to a deep-boring apparatus.

*Sand-pump.* A cylinder with a valve at the bottom, lowered into a drill-hole from

time to time to take out the accumulated slime resulting from the action of the drill on the rock. Called, also, *Shell-pump* and *Sledger*.

*Scal*, CORN. A portion of earth or rock which separates and falls from the main body.

*Scale*. 1. The crust of metallic oxide formed by cooling of hot metals in air. *Hammer-scale* and *roll-scale* are the flaky oxides which fall from the *bloom*, *ingot*, or *bar*, under hammering or rolling. 2. The incrustation caused in steam-boilers by the evaporation of water containing mineral salts. 3. *A scale of air* (NEWC.) is a small portion of air abstracted from the main current.

*Scarcement*. A projecting ledge of rock, left in a shaft as footing for a ladder, or to support pit-work, etc.

*Scarfing*. Splicing timbers, so cut that when joined the resulting piece is not thicker at the joint than elsewhere.

*Schist*. Crystalline rock, usually micaceous, having a slaty structure.

*Schorl*. Black tourmaline.

*Scovan lode*, CORN. A lode having no *gossan* at or near the surface.

*Scraper*. A tool for cleaning bore-holes.

*Screen*. A sieve of wire-cloth, grate-bars, or perforated sheet-iron, used to sort ore and coal according to size. Stamp-mortars have screens on one or both sides, to determine the fineness of the escaping pulp.

*Screw-bell*. A recovering tool in deep boring, ending below in a hollow screw threaded cone.

*Scrin* or *Skrin*, DERB. A small subordinate vein.

*Seam*. 1. A stratum or bed of coal or other mineral. 2. CORN. A horse-load. 3. A *joint*, *cleft*, or *fissure*.

*Seat*, DERB. The floor of a mine.

*Seed-bag*. A bag filled with flaxseed and fastened around the tubing in an artesian well, so as to form, by the swelling of the flaxseed when wet, a water-tight packing, preventing percolation down the sides of the bore-hole from upper to lower strata. When the tubing is pulled up the upper fastening of the bag breaks, and it empties itself, thus presenting no resistance to the extraction of the tubing.

*Segregate*, PAC. To separate the undivided joint ownership of a mining claim into smaller individual "*segregated*" claims.

*Segregation*. A mineral deposit formed by concentration from the adjacent rock.

*Selvage* or *Selfedge*. A layer of clay or decomposed rock along a vein-wall. See *Gouge*.

*Separator*. 1. A machine for separating, with the aid of water or air, materials of different specific gravity. Strictly, a *separator* parts two or more ingredients, both valuable, while a *concentrator* saves but one and rejects the rest; but the terms are often used interchangeably. 2. Any machine for separating materials, as the *magnetic separator* for separating magnetite from its gangue.

*Set* or *Sett*, CORN. 1. A grant of mining ground, as the assignment of a certain part of a mine under contract or *tribute*. 2. A frame of timber for supporting excavations.

*Settler*. A tub or vat, in which *pulp* from the amalgamating *pan* or *battery-pulp* is allowed to settle, being stirred in water, to remove the lighter portions.

*Shadd*, CORN. Smooth, round stones on the surface, containing tin-ore, and indicating a vein.

*Shaft*. 1. A pit sunk from the surface. 2. The interior of a *shaft-furnace* above the boshes.

*Shaft-walls*. 1. The sides of a shaft. 2. NEWC. Pillars of coal left near the bottom of a pit.

*Shake*. 1. A cavern, usually in limestone. 2. A crack in a block of stone.

*Shaking-table*. See *Percussion-table*.

*Shambles*. Shelves or benches from one to the other of which successively ore is thrown in raising it to the level above, or to the surface.

*Shearing*. The vertical side-cutting which, together with *holing* or horizontal undercutting, constitutes the attack upon a *face* of coal.

*Shears*, CORN. Two high timbers, standing over a shaft and united at the top to carry a pulley, for lifting or lowering timbers, pipes, etc., of greater length than the ordinary hoisting-gear can accommodate.

*Sheathing*. A close partition or covering of planks.

*Sheave*. The groove-wheel of a pulley.

*Shelf*, CORN. The solid rock or *bed-rock*, especially under alluvial tin-deposits.

*Shell-pump*. See *Sand-pump*.

*Shelly*. The condition of coal which has been so much faulted and twisted that it is not massive, but easily breaks into conchoidal pieces.

*Shet*, S. STAFF. The broken-down roof of a coal-mine.

*Shift*. 1. The time for a miner's work in one day. 2. The gang of men working for that period, as the *day-shift*, the *night-shift*.

*Shift-boss*. The foreman in charge of a *shift* of men.

*Shiver*. 1. Shale; a hard argillaceous bed. 2. See *Sheave*.

*Shoad*, CORN. Ore washed or detached from the vein naturally. See *Float-ore*.

*Shoading* or *Shoding*, CORN. The tracking of boulders towards the vein or rock from which they have come.

*Shoe*. A piece of iron or steel, attached to the bottom of a *stamp* or *muller*, for grinding ore. The shoe can be replaced when worn out.

*Shoot*. 1. See *Chute*. 2. See *Blast*. A *shot* is a single operation of *blasting*.

*Shooting-needle*. A sharp metal rod, to form a vent-hole through the tamping to a blasting-charge.

*Shore-nose shell*. A cylindrical tool, cut obliquely at bottom, for boring through hard clay.

*Show*. 1. The pale-blue, lambent flame on the top of a common candle-flame, indicating the presence of fire-damp. 2. See *Blossom*.

*Shute*. See *Chute*.

*Sicker*. See *Zighyr*.

*Siddle*. The inclination of a seam of coal.

*Side-basset*. A transverse direction to the line of dip in strata.

*Side-guide*. See *Guard*.

*Side-laning*, S. STAFF. Widening the *gate-road* (abandoned for that purpose) so as to make it part of a new *side of work*.

*Side of work*, S. STAFF. The series of *breasts* and *pillars* connected with a *gate-road* in a colliery.

*Sigger*. See *Zighyr*.

*Silicious*. Consisting of or containing silex or quartz.

*Sill*. 1. A stratum. 2. A piece of wood laid across a drift to constitute a frame with the posts and to carry the track of the tramway.

*Silt*. See *Alluvium*.

*Silver ores*. *Silver-glance* (*argentite*, sulphide); *horn-silver* (*cerargyrite*, chloride); *dark-ruby silver* (*pyrargyrite*, sulphantimonide); *light-ruby silver*, (*proustite*, sulpharsenide); *brittle silver-glance* (*stephanite*, antimonial sulphide of silver, and *polybasite*, arsenical and antimonial sulphide of several metals); *white ore* (argentiferous gray copper, *tetrahedrite*, antimonial sulphide of iron, zinc, copper, lead, and silver); *stetefeldtite* and *partzite* (antimoniates); also, argentiferous lead, copper, and zinc ores.

*Sinker-bar*. A heavy bar attached above the *jars* to *cable-drilling* tools.

*Sit* or *Sits*. A settling or falling of the top of workings. See *Thrust* and *Creep*.

*Sizing*. Separating ores according to size of particles, preparatory to *dressing*.

*Skep* or *Skip*, CORN. An iron box working between guides, in which ore or rock is hoisted. It is distinguished from a *kibble*, which hangs free in the shaft.

*Skimmings* or *Skimpings*, CORN. The poorest part skimmed off the *jigger*.

*Slack*. Small coal, coal dirt; See *Culm* (2).

*Slant*. A heading driven diagonally between the dip and the strike of a coal-seam; also called a *run*. See *Run* and *Counter*.

*Slate*. A sedimentary rock splitting into thin plates. The terms *slate*, *shale* and *schist* are not sharply distinguished in common use, particularly among older writers. Strictly, according to recent authors, *slate* may be crystalline; *schist* is always so; *shale* is always (and *slate* most frequently) non-crystalline. There is also a notion of coarser or less complete lamination attached to the term *shale*, as of a rock splitting into thicker or less perfect plates than *slate*. Both may be argillaceous, arenaceous, calcareous, silicious, etc., according to their lithological character. The terms *slaty*, *shaly* and *schistose* describe the respective structures.

*Sleck*, NEWC. Mud deposited by water in a mine.

*Sleeper*. See *Sill*.

*Sleeping-table*, CORN. A stationary *buddle*. For the strict distinction sometimes made between *buddle* and *table*, see *Buddle*.

*Slickensides*. Polished and sometimes striated surfaces on the walls of a vein, or on interior joints of the vein-material or of rock-masses. They are the result of movement.

*Slide*, CORN. 1. A vein of clay intersecting and dislocating a vein vertically; or the vertical dislocation itself. 2. An upright rail fixed in a shaft with corresponding grooves for steadying the cages.

*Slide-joint*. A connection acting in *rod-boring*, like the jars in *rope-boring*.

*Slimes*, CORN. The most finely crushed ores.

*Slime-table*. See *Buddle*.

*Sline*. Natural traverse cleavage of rock.

*Slip*. A vertical dislocation of the rocks.

*Slipes*, S. STAFF. Sledge-runners, upon which a *skip* is dragged from the working breast to the tramway.

*Slit*. A communication between two levels.

*Slitter*. See *Pick*.

*Sliver*, ENG. A thin wooden strip, inserted into grooves in the adjacent edges of two boards of a *brattice* to make it air-tight.

*Slope*. See *Incline*.

*Sludge*. See *Slimes*.

*Sludger*. See *Sand-pump*.

*Sluicing*. Washing auriferous earth through long boxes (*sluices*).

*Slums*, PAC. See *Slimes*.

*Smeddum*, SCOT. The smaller particles which pass through the sieve of the *kutch*.

*Smift*. A fuse or slow match.

*Smitham* or *Smiddan*, DERB. Lead-ore dust.

*Smut*. 1. S. STAFF. Bad, soft coal, containing much earthy matter. 2. See *Blossom*.

*Snoff*, CORN. A short candle-end, put under a fuse to light it.

*Snore-hole*. The hole in the lower part or *wind-bore* of a mining pump, to admit the water.

*Soapstone*. Compact talc or steatite; often applied incorrectly to soft unctuous clays or marls.

*Sole*. The bottom of a level.

*Solid crib-timbering*. Shaft-timbering with cribs laid solidly upon one another.

*Sollar*, CORN. A platform in a shaft, usually constituting a landing between two ladders.

*Sough*, DERB. See *Adit*.

*Spale*, CORN. To fine for disobedience of orders.

*Spall* or *Spowl*. To break ore. *Ragging* and *cobbing* are respectively coarser and finer breaking than *spalling*, but the terms are often used interchangeably. Pieces of ore thus broken are called *spalls*.

*Spar*. A name given by miners to any earthy mineral having a distinct cleavable structure and some lustre; in Cornwall usually quartz.

*Spears*. See *Pump-rods*.

*Spel* or *Spell*. A change or turn.

*Spend*. To break ground; to continue working.

*Spiking-curb*, ENG. A *curb* to the inside of which *plank-tubing* is spiked.

*Spilling*, CORN. A process of driving or sinking through very loose ground.

*Spills*, CORN. Long thick laths or poles driven ahead horizontally around the door-frames, in running levels in loose ground—a kind of *lagging* put in ahead of the main timbering.

*Spire*. The tube carrying the train to the charge in a blast-hole. Also called *reed* or *rush*, because these, as well as spires of grass, are used for the purpose.

*Split*. 1. To divide a ventilating current. 2. When a *parting* in a coal-seam becomes so thick that the two portions of the seam must be worked separately, each is called a *split*. See *Bench*.

*Spoon*. 1. An instrument made of an ox or buffalo horn, in which earth or *pulp* may be delicately tested by washing to detect gold, amalgam, etc. 2 (or *Spoon-end*). The edge of a coal-basin when the coal-seam *spoons*, *i. e.*, rises to the surface, after growing thinner as it approaches its termination.

*Spout*, S. STAFF. See *Air-head*.

*Sprag*. 1. A *prop*. 2. A short round piece of wood used to block the wheels of a car.

*Spreader*. A horizontal timber below the *cap* of a set, to stiffen the *legs*, and to support the *brattice* when there are two air-courses in the same gangway.

*Spreaders*. Pieces of timber stretched across a shaft, as a temporary support of the walls.

*Spud*. A nail, resembling a horseshoe nail, with a hole in the head, driven into mine-timbering, or into a wooden plug inserted in the rock, to mark a surveying-station.

*Spur*. A branch leaving a vein, but not returning to it.

*Spurns*, S. STAFF. Small connecting masses of coal, left for safety during the operation of cutting, between the *hanging coal* and the main body.

*Square sets*. A kind of timbering used in large spaces.

*Squat*, CORN. 1. Tin-ore mixed with spar. 2. See *Bunch of ore*.

*Squeeze*. The settling, without breaking, of the *roof* over a considerable area of workings.

*Squib*. A slow-match or safety-fuse, used with a *barrel*.

*Stack*. A chimney.

*Stall*, S. STAFF. See *Room*, *Breast*, and *Post-and-Stall*.

*Stamping*. Reducing to the desired fineness in a *stamp-mill*. The grain is usually not so fine as that produced by grinding in *pans*.

*Stamp-mill*. An apparatus (also the building containing the apparatus) in which rock is crushed by descending pestles (*stamps*), operated by water or steam-power. Amalgamation is usually combined with the crushing when gold or silver is the metal sought, but copper and tin-ores, etc., are stamped to prepare them for *dressing*.

*Stamp-work*, LAKE SUP. Rock containing disseminated native copper.

*Stanchion*. See *Leg*.

*Standage*, ENG. A large *sump*, or more than one, acting as a reservoir.

*Stannary*. A tin-mine or tin-works.

*Station*. 1. See *Platt*. 2. Also, a similar enlargement of shaft or level to receive a balance-bob (*bob-station*), pump (*pump-station*), or tank (*tank-station*).

*Steamboat coal*, PENN. See *Coal*.

*Steam-coal*. See *Coal*.

*Stemmer*, NEWC. See *Tamping-bar*.

*Stemming*, NEWC. The tamping put above the charge in a bore-hole.

*Stempel* or *Stemple*. 1. DERB. One of the cross-bars of wood placed in a mine-shaft to serve as steps. 2. A *stull-piece*. 3. A *cap*, both sides of which are *hitched* instead of being supported upon legs. See *Stull*.

*Stenton*, NEWC. A passage between two *winning headways*. A *stenton-wall* is the *pillar* of coal between them.

*Step-vein*. A vein alternately cutting through the strata of *country-rock*, and running parallel with them.

*Stirrup*. See *Temper-screw*.

*Stockwork* (GERM., *Stockwerk*). An ore-deposit of such a form that it is worked in floors or stories. It may be a solid mass of ore, or a rock-mass so interpenetrated by small veins of ore that the whole must be mined together. *Stockworks* are distinguished from *tabular* or *sheet*-deposits (veins, beds), which have a small thickness in comparison with their extension in the main plane of the deposit (that is, in *strike* and *dip*).

*Stone-coal*. See *Coal*.

*Stone-head*, ENG. The solid rock first encountered in sinking a shaft.

*Stoop-and-Rooms*, SCOT. See *Post-and-Stall*.

*Stope*, CORN. To excavate ore in a vein by driving horizontally upon it a series of workings, one immediately over the other, or vice versa. Each horizontal working is called a stope (probably a corruption of *step*), because when a number of them are in progress, each working face being a little in advance of the next above or below, the whole face under attack assumes the shape of a flight of steps. When the first stope is begun at a lower corner of the body of ore to be removed, and, after it has advanced a convenient distance, the next is commenced above it, and so on, the process is called *over-hand* stoping. When the first stope begins at an upper corner, and the succeeding ones are below it, it is *under-hand* stoping. The term *stoping* is loosely applied to any subterranean extraction of ore except that which is incidentally performed in sinking shafts, driving levels, etc., for the purpose of opening the mine.

*Stopping*. 1. See *Stoping*. 2. A partition of boards, masonry, or rubbish, to stop the air-current in a mine, or force it to take a special desired direction.

*Stove-coal*, PENN. See *Coal*.

*Stowbord*, NEWC. A place into which rubbish is put.

*Stowce*. 1. A windlass. 2. DERB. *Stowces* are wooden landmarks, placed to indicate possession of mining ground.

*Stowing*. A method of mining in which all the material of the vein is removed and the waste is packed into the space left by the working.

*Strake*, CORN. An inclined *launder* for separating or *tying* ground ore in water.

*Stratum*. A bed or layer.

*Streak*. The powder of a mineral, or the mark which it makes when rubbed upon a harder surface.

*Stream-tin*, CORN. Tin-ore in alluvial deposits, as pebbles.

*Stream-work*, CORN. Work on *stream-tin*.

*Streamers*, CORN. Searchers for *stream-tin*.

*Striated*. Marked with parallel grooves or *striæ*.

*Strike*. The direction of a horizontal line, drawn in the middle plane of a vein or stratum not horizontal.

*String*, CORN. A small vein.

*Stringing-deals*, ENG. Thin planks, nailed to the inside of the curbs in a shaft, so as to suspend each curb from those above it.

*Strip*. To remove from a quarry, or other open working, the overlying earth and disintegrated or barren surface rock.

*Studdles*, CORN. 1. Props supporting the middle of *stulls*. 2. Distance-pieces between successive frames of timbering.

*Stull*, CORN. A platform (*stull-covering*), laid on timbers (*stull-pieces*), braced across a working from side to side, to support workmen or to carry ore or waste.

*Stulm*. See *Adit*. From the GERM. *Stollen*.

*Stump*, PENN. A small pillar of coal, left at the foot of a *breast* to protect the *gangway*.

*Sturt*. A *tribute*-bargain which turns out profitable for the miner.

*Stythe*, NEWC. *Choke-damp*.

*Sublimation-theory*. The theory that a vein was filled first with metallic vapors.

*Sucker-rod*. The *pump-rod* of an oil well.

*Sulphur*. 1. Iron pyrites. 2. Carburetted or sulphuretted hydrogen.

*Sulphurets*, PAC. In miners' phrase, the undecomposed metallic ores, usually sulphides. Chiefly applied to auriferous pyrites.

*Sump*, CORN. (from GERM. *Sumpf*.). The space left below the lowest landing in a shaft, to collect the mine-water. The lowest pump draws from it. 2. NEWC. That part of a *judd* of coal which is extracted first.

*Sump-fuse*. A waterproof fuse.

*Swad*, NEWC. A thin layer of stone or refuse coal at the bottom of the seam.

*Swape*. An implement for shaping the edge of a boring-bit.

*Swalls*, *Swallows* or *Swallow-holes*. Surface holes caused by the subsidence of rocks; or openings into which mine-water disappears.

*Swamp*. A depression in a nearly horizontal bed, in which water may collect.

*Sweeping table*. A stationary *buddle*.

*Synclinal*. The axis of a depression of the strata. Opposed to *anticlinal*, which is the axis of an elevation.

*Tackle*, CORN. The *windlass*, rope, and *kibble*.

*Tacklers*, DERB. Small chains put around loaded *corves*.

*Tail-house*, *Tail-mill*. The buildings in which *tailings* are treated.

*Tailing*. See *Blossom*.

*Tailings*. The lighter and sandy portions of the ore on a buddle or in a sluice. The *headings* are accumulated or discharged at the upper end, the *middlings* in the middle, while the *tailings* escape at the foot. The term *tailings* is used in a general sense for the refuse of reduction processes other than smelting.

*Tail-race*. The channel in which *tailings*, suspended in water, are conducted away.

*Tamp*. To fill (usually with clay-tamping) the bore-hole or other opening through which an explosive charge has been introduced for blasting.

*Tamping-bar*, CORN. A rod used in tamping.

*Tank*. A subterranean reservoir into which a pump delivers water for another pump to raise.

*Temper-screw*. A screw-connection for lengthening the column of boring-rods as boring advances.

*Tepetate*, SP. Waste rock and rubbish in a mine.

*Terne-plate*. A variety of tin-plate coated with an alloy of one-third tin, and two-thirds lead.

*Thermo-aqueous*, Produced by, or related to, the action of heated waters.

*Thill*, NEWC. The floor of a coal mine.

*Thirling*. See *Thurling*.

*Throw*. A dislocation or fault of a vein or stratum, which has been *thrown up* or *down* by the movement.

*Throwing*, S. STAFF. The operation of breaking out the *spurns*, so as to leave the *hanging coal* unsupported, except by its own cohesion.

*Thrust*. The breaking down or the slow descent of the roof of a *gangway*. Compare *Creep*.

*Thurl*, S. STAFF. To cut through from one working into another.

*Thurlings*. Passages cut from *room* to *room*, in *post-and-stall* working.

*Thurst*. The ruins of the fallen roof, after *pillars* and *stalls* have been removed.

*Ticketings*, CORN. Meetings for the sale of ores.

*Tick-hole*. See *Vugg*.

*Tierras*, SP. Fine dirt impregnated with quicksilver ore, which must be made into *adobes* before roasting.

*Tiger*. See *Nipping fork*.

*Tiller*. See *Brace-head*.

*Tin-frame*, CORN. A *sleeping-table* used in dressing tin-ore slimes, and discharged by turning it upon an axis till its surface is nearly vertical, and then dashing water over it, to remove the enriched deposit. A "machine frame" or "self-acting frame" thus discharges itself automatically at intervals; a "hand-frame" is turned for the purpose by hand.

*Tin-ores*. Tinstone (*cassiterite*, oxide); *tin-pyrites* (*stannite*, sulphide of tin, copper, iron and zinc). The latter is not, so far as I am aware, now actually treated for tin. Ores containing it are smelted as copper-ores, and the tin is lost.

*Tin-witts*, CORN. The product of the first dressing of tin-ores, containing, besides tinstone, other heavy minerals (wolfram and metallic sulphides). It must be roasted before it can be further concentrated. Its first or partial roasting is called *rag-burning*.

*Tipe*. To upset or "dump" a *skip*.

*Toadstone*. A kind of trap-rock.

*Ton*. For many things, such as coal and iron, the ton in use is the *long* ton of 20 hundredweight at 112 pounds avoirdupois. Allowances ("sandage," etc), are made in weighing pig-iron and other crude metals, so that the "smelter's ton" is still greater. The Cornish mining ton is 21 hundredweight, or 2352 pounds avoirdupois. In gold and silver mining, and throughout the Western States, the ton is the *short* ton of 2000 pounds.

*Tonite*. A nitrated gun-cotton, used in blasting.

*Top-wall*. See *Hanging-wall*.

*Tossing* or *tozing*, CORN. 1. Washing ores by violent agitation in water, their subsidence being accelerated by *packing* or striking with a hammer the *keeve* in which the operation is performed. *Chimming* is a similar process on a smaller scale. 2. Refining tin by allowing it, while molten, to fall several feet through the air.

*Towt*, NEWC. A piece of old rope.

*Tram*, WALES. 1. A four-wheeled truck to carry a *tub*, *corve* or *hutch*, or to carry coal or ore on a railroad. 2. One of the rails of a *tramroad* or railroad.

*Trap*. In miners' parlance, any dark, igneous or apparently igneous, or volcanic rock.

*Trap-door*. See *Weather-door*.

*Trapische*, SP. A rude grinding machine, composed of two stones, of which the upper is fastened to a long pole.

*Trapper*, NEWC. A boy who opens and shuts the *trap-door*.

*Tribute*, CORN. A portion of ore given to the miner for his labor. *Tributors* are miners working under contract, to be paid by a *tribute* of ore or its equivalent price, the basis of the remuneration being the amount of clean ore contained in the crude product.

*Trogue*. A wooden trough, forming a drain.

*Trolly*. A small four or two-wheeled truck without a body.

*Trombe* or *Trompe*, FR. An apparatus for producing an air-blast by means of a falling stream of water, which mechanically carries air down with it, to be subsequently separated and compressed in a reservoir or drum below.

*Trommel*. A revolving sieve for *sizing* ores.

*Trouble*, NEWC. A dislocation of the strata.

*Trow*. A wooden channel for air or water.

*Trumpeting*, S. STAFF. A small channel cut behind the brick-work of a shaft lined with masonry.

*Trunk*, CORN. A long narrow box or square tube, usually of wood.

*Trunking*, CORN. Separating slimes by means of a *trunk*.

*Tubbing*. A shaft-lining of casks or cylindrical caissons, of iron or wood. See *Plank-tubbing*.

*Tubing*. Lining a deep bore-hole by driving down iron tubes.

*Tubs*, NEWC. Boxes for lowering coals. See *Trolly*.

*Tuff* or *Tufa*. A soft sandstone or calcareous deposit.

*Tug*, DERB. The iron hook of a hoisting bucket, to which the *tacklers* are attached.

*Tunnel*. 1. A nearly horizontal underground passage, open at both ends to *day*. 2. PAC. See *Adit*.

*Turbary*. A peat-bog.

*Turn*. A pit sunk in a *drift*.

*Turning-house*. The first working on a vein after it has been intersected by a *cross-cut*.

*Tut-work*. See *Dead work*. In general, work paid for by the amount of excavation, not (as in *tribute*) of product.

*Tying*, CORN. See *Strake*.

*Under-hand*. See *Stope*.

*Underlayer*, CORN. A vertical shaft sunk to cut a lode.

*Underlie* or *Underlay*, CORN. The departure of a vein or stratum from the vertical, usually measured in horizontal feet per fathom of inclined depth. Thus a *dip* of 60° is an *underlay* of three feet per fathom. The *underlay* expressed in feet per fathom is six times the natural cosine of the angle of the dip. See *Dip*.

*Unwater*. To drain or pump water from a mine.

*Upcast*. 1. A lifting of a coal seam by a dike. 2. The opening through which the ventilating current passes out of a mine. See *Downcast*.

*Upraise*. See *Rise*.

*Vamping*. The *debris* of a stope, which forms a hard mass under the feet of the miner.

*Vanning*, CORN. A method of washing ore on a shovel, analogous to *panning*. Concentrating machines are sometimes called *vanners*. See *Percussion-table*.

*Vein*. See *Lode*. The term *vein* is also sometimes applied to small threads, or subordinate features of a larger deposit.

*Vena*, SP. A small vein.

*Vend*, NEWC. The total sales of coal from a colliery.

*Verifier*. A tool used in deep boring for detaching and bringing to the surface portions of the wall of the bore-hole at any desired depth.

*Vestry*, NEWC. Refuse.

*Veta*, SP. A vein. As compared with *vena*, *veta* is the main vein.

*Viewer*. A colliery manager.

*Vigorite*. See *Explosives*.

*Vug*, *vugg*, or *vugh*. A cavity in the rock, usually lined with a crystalline incrustation. See *Geode*.

*Wad hook*. A tool with two spiral steel blades for removing fragments from the bottom of deep bore-holes.

*Wagon*. A four-wheeled vehicle used in coal mines, usually containing 75 to 100 cubic feet.

*Wagon-breast*. A *breast* into which wagons can be taken.

*Wale*, NEWC. To clean coal by picking out the refuse by hand. The boys who do this are called *Walers*.

*Wall*. 1. The side of a level or drift. 2. The *country-rock* bounding a vein laterally.

*Wall-plates*, CORN. The two side-pieces of a timber frame in a shaft, parallel to the strike of the lode when the shaft is sunk on the lode. The other two pieces are the *end-pieces*.

*Washer*. See *Ore-washer*.

*Waste*, NEWC. Old workings. The signification seems to include that of both *goaf* and *gob*.

*Wastrel*. A tract of waste land or any waste material.

*Water-barrel or Water-tank.* A barrel or box, with a self-acting valve at the bottom, used for hoisting water in lieu of a pump.

*Water-level.* 1. The level at which, by natural or artificial drainage, water is removed from a mine or mineral deposit. 2. A drift at the water-level.

*Water-packer.* A water-tight packing of leather between the pipe and the walls of a bore-hole.

*Way-shaft.* See *Blind-shaft.*

*Weather-door.* A door in a level to regulate the ventilating current.

*Weathering.* Changing under the effect of continued exposure to atmospheric agencies.

*Wedging-curb* or *Wedging-crib*, ENG. A *curb* used to make a water-tight packing between the *tubbing* in a shaft and the rock-walls, by means of spilt *deals*, moss, and wedges, driven in between the *curb* and the rock.

*Wharl* or *Wharr*, NEWC. A sledge for hauling corves in low drifts.

*Wheal*, CORN. A mine.

*Whim* or *Whimsey.* A machine for hoisting by means of a vertical drum, revolved by horse or steam power.

*Whin* or *Whinstone*, NEWC. Basaltic rock; any hard, unstratified rock. In Scotland, greenstone.

*Whip.* The simplest horse-power hoisting machine, consisting of a fixed pulley and a hoisting rope passing over it, to which the animal is directly attached.

*White-ash*, PENN. See *Coal.*

*White-damp.* A poisonous gas sometimes (more rarely than fire damp or choke-damp, etc.,) encountered in coal mines. It has been supposed to contain carbonic oxide, but this is doubtful.

*White tin*, CORN. *Metallic tin.*

*Whits* or *Witts*, CORN. See *Tin-witts.*

*Whole-working*, NEWC. Working where the ground is still whole, *i. e.*, has not been penetrated as yet with breasts. Opposed to *pillar-work*, or the extraction of pillars left to support previous work.

*Wild lead.* Zinc-blende.

*Wicket.* A *breast.* See *Breast* and *Post-and-stall.*

*Whimble.* A shell-auger used for boring in soft ground.

*Win.* To extract ore or coal.

*Windbore*, NEWC. The pipe at the bottom of a set of pumps.

*Winch* or *Windlass.* A man-power hoisting machine, consisting of a horizontal drum with crank handles.

*Winding.* Hoisting with a rope and drum.

*Winds.* See *Winze.*

*Winning.* 1. A new opening. 2. The portion of a coal field laid out for working.

*Winning headways*, NEWC. Headways driven to explore and open out the coal seam.

*Winze.* An interior shaft, usually connecting two levels.

*Wood-tin.* Tinstone of light wood-color.

*Work.* Ore not yet dressed.

*Working.* See *Labor.* The Spanish and the English term are synonymous in meaning and alike in application. A *working* may be a *shaft*, *quarry*, *level*, *open-cut*, or *stope*, etc.

*Working-barrel*, CORN. The cylinder in which a pump piston works.

*Working home.* Working toward the main shaft in extracting ore or coal, as in *long-wall retreating.*

*Working out.* Working away from the main shaft in extracting ore or coal, as in *long-wall advancing.*

*Yellow-ore*, CORN. Chalcopyrite. See *Copper ores.*

*Yokings.* See *Stowces.*

*Zawn*, CORN. A cavern.

*Zighyr*, *zigger*, or *sicker*, CORN. To percolate, trickle or ooze, as water through a crack. From the GERM., *sickern.*

*Zinc-ores. Red ore* (*zincite*, oxide); *black-jack* (*zinc-blende*, *spahlerite*, sulphide); *zinc-spar* (*noble calamine*, *Smithsonite*, carbonate, and *earthy calamine*, *hydrozincite*, hydrated carbonate); *silicious oxide* (*willemite*, anhydrous, and *calamine*, hydrated silicate).

### c. HOW TO EXAMINE TITLE.*

The written title to a mining-claim begins with the location certificate, after which the conveyances and encumbrances should appear upon the abstract as in other classes of real estate.

In addition to the abstract of title, a survey and local inspection are indispensable to security.

The abstract (at least until patent) may show a clear chain of title, but such abstract may be based on a location or a record prior to other locations on the same vein, and the title be absolutely worthless. An adverse discovery may exist within a few feet of the discovery of the claim under examination. Every hole or stake in proximity to the claim should be examined, its history traced, and the possibility of danger from that source guarded against.

Whether the annual labor has been done must also be ascertained.

Such inspection having been made, and the points peculiar to the title, as a mining title, being examined as they occur, the course of examination will be as follows:

*The Abstract.*—The abstract should be certified by the recorder, or by some respectable abstract firm, to contain all deeds and instruments filed or recorded, in the office of the recorder, conveying, encumbering, or in any manner affecting title to the property in question.

The abstract, however, amounts to nothing more than a guide or memorandum to the attorney in his examination.

Each deed and other instrument must be inspected at length, either by the original or by a certified copy.

*Location Certificate.*—The material points to be observed in the location certificate are that (especially since May 10, 1872) it contains:

1. The names of locators.
2. The date of location.
3. Such a description as will identify the claim.
4. That it claims no greater number of feet than was allowed at date of discovery.
5. That it shows a sufficient number of locators to claim the full number of feet.

*Conveyance.*—A mine is conveyed by deed or encumbered by mortgage the same as other real estate.

The description should contain:

1. The name of the lode.
2. The number of feet and their position relative to the discovery-shaft.
3. The slope and name of the mountain or gulch.
4. If patented, the number of the survey lot.
5. Mining district, county, and Territory.
6. Proper recitals of previous conveyances, especially the patent.

The essential points of such description are the name of the lode, district, county, and Territory.

Placer-claims are usually described by their numbers, or, if patented, by the survey lines or number of the survey lot.

After the special description, the usual formula of printed deeds may

* From Morrison's Mining Rights in Colorado.

be sufficient; but a deed technically drawn and intended to convey lode mining premises, will proceed, "Together with all and singular the dips, spurs, variations, angles, and feeders of said lode, and all veins, deposits, mines, and minerals, within the lines of said claim, with the improvements, drifts, shafts, adits, ways, water-courses, timber, easements, rights, privileges, and appurtenances thereunto in anywise belonging."

Each deed or instrument must be examined to ascertain—

That it has been signed by the proper parties.

That it is under seal.

That it sets forth a consideration.

That it contains a sufficient description of the premises.

That it contains sufficient words of conveyance.

That no lien of purchase-money is therein reserved.

That there are no words of condition, qualification, or reservation, by which a less than a fee simple estate may be limited, or by which a supposed conveyance may be construed as a mortgage.

That each letter of attorney grants sufficient power to sell and convey.

That each deed under power of attorney is executed in conformity with such power, and that the name of the principal, at least, appears in the body of the deed, and that it is signed "A B by C D, his attorney in fact," or words equivalent thereto.

That each title bond or agreement to convey has been released, or else a conveyance made in conformity with such bond or agreement.

That every mortgage, trust deed, attachment, mechanic's lien, certificate of levy, tax sale, judicial sale, judgment, transcript, has been either properly proceeded upon if title is claimed under it; or, on the other hand, released if it is found in opposition to a clear title.

That especially in sales under a trust deed, due publication has been made, and all the terms of such trust deed complied with as to time, place, and terms of sale, etc., all of which should appear recited in the deed made by the trustee to the purchaser.

That every letter of attorney, deed, mortgage, etc., has been duly acknowledged before some proper officer; and especially that prior to February 12, 1874, each acknowledgment by a married woman has been "separate and apart from and out of the presence of" her husband, and that the "contents, meaning, and effect" of the deed were by the officer "fully explained to her."

A warranty deed conveys to the grantee any after-acquired title in his grantor, and even a quit-claim made between the application and the issue of patent is presumed to carry the patented title to the grantee.

*Patents.*—In case of a patented claim, the land-office receipt and patent should appear on the abstract. If there is a receipt but no patent, the title is still possessory. If there is a patent, it carries the legal title back *at least* to the entry, if not to the date of application.

The form of patent is quite different from that of a patent for agricultural lands, and contains certain provisions as to easements, etc., and also a plan of the survey and the surface-ground of any previous survey crossing the line of the lot conveyed. It also excepts the "claim" of the party who has entered the interfering lot.

In case of overlapping surveys, too much care cannot be exercised in

observing to what extent they may cover the vein of the lode. Even if they do not *cover* the vein, it remains an undecided question as to whether the vein is not conveyed, independently of the fact of its apex lying within the surface lines. The question of priority then becomes important. A junior patent upon a senior entry is certainly superior to a senior patent with a junior entry; that the patent even relates back to the date of the application, is the general opinion of the profession. The idea that it may relate back to the discovery is scarcely tenable, but in any event it is essential to examine behind the patent, back to the discovery or the first record, on account of the possibility of liens, which are not divested by the patent. (See Richmond *vs.* Eureka, p. 365.)

*Certificate of Clerk of District Court.*—A certificate should then be had and attached to the abstract from the clerk of the district court of the proper county, certifying that there are no judgments, transcripts, attachments, or other liens of record in such court against the property or appearing against the names of any of the present or former owners, during such time as the abstract may show it was liable to lien through each particular owner, and that there are no suits pending affecting such property or the title thereto, either in such district court or in supreme court, on error or appeal. If there are suits or liens, he will so certify, with reference to term and docket, whereupon they should be examined, by inspection of the original records with the same particularity as the deeds in the abstract, so that it may be seen to what extent they encumber the premises or threaten the quiet enjoyment thereof; and if such suits or liens have been satisfied or settled, it should be made plainly so to appear upon the records.

The time above mentioned, during which a judgment may intervene against any particular owner, may be calculated *from the last day of the term of court prior to a date seven years before the date of the examination, forwards until the record of the deed by which each particular owner parted with his interest.*

It seems that since February 8, 1872 (1872, page 112), no judgment becomes a lien until date of filing transcript in the office of the recorder, and when so filed should appear in the abstract; but this will not apply to judgments previously obtained, nor to transcripts.

*Certificate of Probate Judge.*—The probate judge certifies to the same points as in the certificate of the clerk of the district court; and further as to any will or intestate proceedings, if any, of record in his court, whereupon the same should be examined as to the terms of any such will, and whether any lien or debt of decedent, or legacy, may exist, and whether there has been any sale by executor or administrator.

*Examination of Records of Court.*—If from the abstract, or any of the above certificates, there appears to have been a judicial sale, probate sale, tax, or other official sale, the whole proceedings, from the summons, petition, assessment, or other starting-point, must be examined as to their validity at all stages, up to their consummation by sheriff's deed or otherwise.

*Other Liens.*—There may still exist a lien in the supreme court, either in a bankruptcy case or upon the ordinary proceedings in that court, but the precaution of a certificate from the clerk is not usually required. There may be also a lien in favor of the Territory, on an

account audited in its favor, (R. S. p. 79, sec. 6,) or for fine and costs in a criminal case against either a defendant or the surety on his bond for fine and costs, (R. S. pages 244 and 245, secs. 220 and 221,) or a miners' or mechanics' lien.

*Taxes.*—Tax sales should appear on the abstract; recent taxes in the treasurer's office. The statutory time for redemption from tax sale is two years from date of sale, or any time before execution of the tax deed. Redemption money must include the amount bid at sale, fifty per cent. additional, and twenty-five per cent. annual interest; also all subsequent taxes paid by the purchaser, with twenty-five per cent. annual interest. (1870, p. 114.)

Where there is no agreement between grantor and grantee as to recent taxes, and the deed is made before May 1, the grantee is liable; if made at a later date in the year than May 1, the grantor should pay them. This is only, however, the law as between grantor and grantee, for in any event if not paid they follow the land. (1870, p. 123).

*Parties in possession.*—If parties are in actual possession, claiming adverse to the party intending to convey, or claiming under him as lessees, their possession is an assertion of their claim, whatever it may be, of which the purchaser must take notice at his peril.

*Conclusion.*—If from the abstract, or from any of the certificates, or from inspection of any deed, instrument, or record in the chain of title; or as the result of his client's inspection and survey of the premises; or from any other source, the attorney is informed of any adverse title, or any outstanding trust or adverse interest, or of any missing conveyance in the chain of title, or of any serious defect in the body or acknowledgment of any instrument, of such nature as to invalidate the title, the true condition of such title should then, with due secrecy, be expressed to the client. And when the attorney has satisfied his own mind upon all such questions of law as may have arisen during the course of his examination, the client has a right to be advised of all points which remain in doubt, and of any contingencies which may threaten the quiet enjoyment or would obstruct a sale of the premises; and of all steps which if presently taken may avoid such conditions and perfect the title, so that the true value of the title in law shall be represented to the client, that is, the intending purchaser. For in all cases of examination of title the attorney should be selected, or at least assented to, by the purchaser, if it be a sale; by the lender of money, if it be a mortgage; because, from the necessity of the case, he acts in the interest of the purchaser and of the lender, and not in that of the grantor or the mortgagor; the charge for his examination should be made against the same side; the charge for the conveyance, on the other hand, is by custom made against the vendor.

## *d.* PUBLIC LAND COMMISSION'S CODIFICATION. EXTRACT RELATING TO MINERAL LANDS.

### CHAPTER THIRTEEN. MINERAL LANDS.

Sec.
386. Mineral lands reserved.
387. Mineral lands open to purchase by citizens.
388. Length of mining-claims upon veins or lodes.
389. Proof of citizenship.
390. Locators' rights of possession and enjoyment.
391. Owners of tunnels, rights of.
392. Subjects upon which miners may make regulations. Conditions same are subject to. What miners' records shall contain. Annual expenditures. Forfeiture and right of relocation. Mode of forfeiture for failure of co-owners to contribute to annual expenditures.
393. Patents for mineral lands, how obtained. Authority for agents to make applications and affidavits.
394. Adverse claim, proceedings on.
395. Description of vein claims on surveyed and unsurveyed lands.
396. Pending applications, existing rights.
397. Conformity of placer-claims to surveys, limit of.
398. Subdivisions of ten-acre tracts; maximum of placer locations.
399. Conformity of placer-claims to surveys; limitation of claims.
400. What evidence of possession, &c., to establish a right to a patent.
401. Proceedings for patent for placer-claims, &c.
402. Surveyor-general to appoint surveyors of mining-claims, &c.
403. Verifications of affidavits, &c.
404. Where veins intersect, &c.
405. Patents for non-mineral lands, &c.
406. What conditions of sale may be made by local legislature.
407. Vested rights to use of water for mining, &c.; right of way for canals.
408. Pre-emption and homestead patents subject to vested and accrued water rights.
409. Mineral lands in which no valuable mines are discovered open to homesteads.
410. Mineral lands, how set apart as agricultural lands.
411. Additional land districts and officers, power of the President to provide.
412. Provisions of this chapter not to affect certain rights.
413. Mineral lands in certain States excepted.
414. Deposits of coal, iron, and lead in Missouri and Kansas excepted.
415. Grants of lands to States or corporations not to include mineral lands.
416. Entry of coal lands.
417. Pre-emptions of coal lands.
418. Pre-emption claims of coal lands to be presented within sixty days, &c.
419. Only one entry allowed.
420. Conflicting claims.
421. Rights reserved.

SEC. 386. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

14 Stat. 86; 18 *id.* 476; R. S. 2318. U. S. *vs.* Gear, 3 How. 120; Cooper *vs.* Roberts, 18 *id.* 73; U. S. *vs.* Gratiot, 14 Pet. 526; Sparrow *vs.* Strong, 3 Wall. 97; Secretary *vs.* McGarrahan, 9 *id.* 298; Morton *vs.* Nebraska, 21 *id.* 660; *Copp's Mineral Lands*, 478. Heydenfeldt *vs.* Mining Co., 3 Otto, 634; *Copp's Mineral Lands*, 464. U. S. *vs.* Parrott, 1 McAllister, C. C. 272; U. S. *vs.* Gratiot, 1 McLean, C. C. 454; Indiana *vs.* Miller, 3 *id.* 151. 3 Op. Att. Gen. 277; 5 *id.* 247; 7 *id.* 636; 10 *id.* 184. Heydenfeldt *vs.* Mining Co., 10 Nev. 290; Gold Hill Co. *vs.* Ish, 5 Oreg. 104; *Copp's Mineral Lands* 454; Hicks *vs.* Bell, 3 Cal. 219; Stoakes *vs.* Barrett, 5 *id.* 36; People *vs.* Folsom, 5 *id.* 373; Conger *vs.* Weaver, 6 *id.* 548; Nims *vs.* Johnson, 7 *id.* 111; Boggs *vs.* Merced Mining Co., 14 *id.* 279; Burage *vs.* Smith, 14 *id* 380; Moore *vs.* Smaw, 17 *id.* 199; Lentz *vs.* Victor, 17 *id.* 272; Fremont *vs.* Seals, 18 *id.* 433; Rogers *vs.* Soggs, 22 *id.* 444; Rupley *vs.* Welch, 23 *id.* 452; Doran *vs.* Railway Co., 24 *id.* 245; Wixon *vs.* Bear River Co., 24 *id.* 367; Ah Yew *vs.* Choate, 24 *id.* 562; Higgins *vs.* Houghton, 25 *id.* 252; Morton *vs.* Solambo Mining Co., 26 *id.* 527; Alford *vs.* Barnum, 45 *id.* 482; McLaughlin *vs.* Powell, 50 *id.* 64; Titcomb *vs.* Kirk, 51 *id.* 288. Decisions Sec. Int., *Copp's Mineral Lands* 232; *id.* 263; Decisions Com. G. L. O., Copp's Mg. Dec. 308; *Copp's Mineral Lands* 137. Cir. G. L. O., April 27, 1880. *Copp's Mineral Lands* 56.

SEC. 387. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

17 Stat. 91; 19 *id.* 52; R. S. 2319. Cooper *vs.* Roberts, 18 How. 173; Sparrow *vs.* Strong, 3 Wall 97; Heydenfeldt *vs.* Mg. Co., 3 Otto 634; *Copp's Mineral Lands* 464; Forbes *vs.* Gracey, 4 *id.* 762; *Copp's Mineral Lands* 468; U. S. *vs.* Parrott, 1 McAllister, C. C. 271; Chapman *vs.* Toy Long, 4 Saw. C. C. 28; Mt. Diablo Mg. Co. *vs.* Callison, 5 Saw. C. C. 439; Stroud *vs.* Railway Co., 4 Dillon C. C. 396; 4 *Copp's Land Owner* 170. Hibschle *vs.* Gildersleeve, U. S. Dis. Ct. Col. 1880, in manuscript. 14 Op. Att. Gen. 115; *id.* Aug. 6, 1875, in manuscript. Rogers *vs.* Cooney, 7 Nev. 213; Golden Fleece Co. *vs.* Cable Mg. Co., 12 *id.* 312; Territory *vs.* Lee, 2 Montana, 124; Gold Hill Co. *vs.* Ish, 5 Oreg. 104; *Copp's Mineral Lands* 454; Hicks *vs.* Bell, 3 Cal. 219; Stoakes *vs.* Barrett, 5 *id.* 36; Tartar *vs.* Spring Creek Co., 5 *id* 395; Bridge *vs.* Underwood, 6 *id.* 45; Mitchell *vs.* Hargood, 6 *id.* 148; Conger *vs.* Weaver, 6 *id.* 548; Crandall *vs.* Woods, 8 *id.* 136; Weimer *vs.* Lowrey, 11 *id.* 104; Boggs *vs.* Merced, Mg. Co., 14 *id.* 279; Henshaw *vs.* Clark, 14 *id.* 461; Clark *vs.* Duval, 15 *id.* 85; Smith *vs.* Doe, 15 *id.* 100; Moore *vs.* Smaw, 17 *id.* 199; Lentz *vs.* Victor, 17 *id.* 272; Fremont *vs.* Seals, 18 *id.* 433; Logan *vs.* Driscoll, 19 *id.* 623; Rupley *vs.* Welch, 23 *id.* 452; Ensminger *vs.* McIntire, 28 *id.* 593; Doran *vs.* Railway Co., 24 *id.* 245; Richardson *vs.* McNulty, 24 *id.* 339; Wixon *vs.* Bear River Co., 42 *id.* 367; Ah Yew *vs.* Choate, 24 *id.* 562; Higgins *vs.* Houghton, 25 *id.* 252; Morton *vs.* Solambo Mg. Co, 26 *id.* 527; Gibson *vs.* Puchta, 33 *id.* 310; Levaroni, *vs.* Miller, 34 *id.* 231; Alford *vs.* Barnum, 45 *id.* 482; McLaughlin *vs.* Powell, 50 *id.* 64; Laird *vs.* Waterford, 50 *id.* 315; Titcomb *vs.* Kirk, 51 *id.* 288. Decisions Sec. Int., Aug. 26, 1871, *Copp's Mineral Lands* 83; Sept. 3, 1872, *id.* 88; Jan. 2, 1875, *id.* 154. Decisions Com. G. L. O., June 7, 1871, *id.* 80; July 10, 1873, *id.* 119; July 15, 1873, *id.* 50; Nov. 18, 1873, *id.* 124; May 2, 1874, *id.* 134; Oct. 23, 1874, *id.* 143; Jan. 30, 1875, *id.* 160; June 28, 1875, *id.* 176; Dec. 3, 1875, *id.* 182; April 24, 1876, *id.* 189; Nov. 13, 1877, *id.* 221.

SEC. 388. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other.

17 Stat. 91; 19 *id.* 52; R. S. 2320. Flagstaff Silver Mg. Co. *vs.* Tarbet, 8 Otto 463; *Copp's Mineral Lands* 347. The Eureka case, 4 Saw. C. C. 302; *Copp's Mineral Lands*, 352; Mt. Diablo Mg. Co. *vs.* Callison, 5 *id.* 439; Mallett *vs.* Uncle Sam Co., 1 Nev. 188; State *vs.* Rhodes, 4 *id.* 312; Foot *vs.* National Mg. Co., 2 Montana, 402; Moxon *vs.* Wilkinson, 2 *id.* 421; Prosser *vs.* Parks, 18 Cal. 47; Logan *vs.* Dris-

coll, 19 *id.* 623; Tunnel Co. *vs.* Stranahan, 31 *id.* 387; Correa *vs.* Frietas, 42 *id.* 339; Harvey *vs.* Bryan, 42 *id.* 626; Titcomb *vs.* Kirk, 51 *id.* 288. Decision Sec. Int., Aug. 26, 1874, *Copp's Mineral Lands* 140. Decisions Com. G. L. O., Nov. 6, 1869, *Copp's Mg. Dec.* 23; Sept. 22, 1870, *Copp's Mineral Lands* 76; Aug. 4, 1871, *Copp's Mg. Dec.* 57; Aug. 25, 1871, *Copp's Mineral Lands* 82; March 19, 1873, *Copp's Mg. Dec.* 164; May 1, 1873, *Copp's Mineral Lands* 113; May 20, 1873, *Copp's Mg. Dec.* 201; June 17, 1873, *Copp's Mineral Lands* 117; July 10, 1873, *id.* 119; Nov. 18, 1873, *id.* 124; February 11, 1875, 1 *Copp's L. O.* 179; Dec. 29, 1875, 2 *id.* 146; Aug. 28, 1876, *Copp's Mineral Lands* 194; May 4, 1880, *id.* 276.

SEC. 389. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

17 Stat. 94; 19 *id.* 52; R. S. 2321. Craig *vs.* Bradford, 3 Wheat. 594; Governeur's heirs *vs.* Robertson, 11 *id.* 332; Cross *vs.* DeValle, 1 Wall. 1; Osterman *vs.* Baldwin, 6 *id.* 116; Phillips *vs.* Moore, 10 Otto 208. 5 Op. Att. Gen. 551; *id.* Aug. 6, 1875, in manuscript. Jackson *vs.* Beech, Johnson's Cases 401. Decisions Sec. Int., Jan. 2, 1875, *Copp's Mineral Lands* 154; April 1, 1875, *id.* 162; July 29, 1876, *id.* 194; July 26, 1879, G. L. O. Rep. 1879, p. 157; Decisions Com. G. L. O., June 7, 1871, *Copp's Mineral Lands* 80; Aug 13, 1872, *id.* 88; Sept. 7, 1874, 1 *Copp's L. O.* 98; Oct. 28, 1875, *Copp's Mineral Lands* 180; April 14, 1876, G. L. O. Rep. 1877, p. 83; July 18, 1876, *Copp's Mineral Lands* 192.

SEC. 390. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. No possessory action between individuals, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession.

13 Stat. 441; 17 *id.* 91; 19 *id.* 52; R. S. 910, 2322. Sparrow *vs.* Strong, 3 Wall, 97; Heydenfeldt *vs.* Mining Co., 3 Otto 634, *Copp's Mineral Lands* 464; Forbes *vs.*

Gracey, 4 *id.* 762, *Copp's Mineral Lands* 468; Jennison *vs.* Kirk, 8 *id.* 453, *Copp's Mineral Lands* 471; Flagstaff Silver Mg. Co. *vs.* Tarbet, 8 *id.* 463; *Copp's Mineral Lands* 347. The 420 Mg. Co. *vs.* The Bullion Co., 3 Saw. C. C. 634; *Copp's Mineral Lands* 444; The Eureka Case, 4 *id.* 302, *Copp's Mineral Lands* 352; Chapman *vs.* Toy Long, 4 *id.* 28; Kinney *vs.* Con. Va. Mg. Co., 4 *id*, 382; Mt. Diablo Mg. Co. *vs.* Callison, 5 *id.* 489; Hibschle *vs.* Gildersleeve, U. S. Dist. Ct. Colo. 1880, in manuscript. Hale *et al. vs.* Story Co., 1 Nev. 104; People *vs.* Logan, 1 *id.* 109; Leet *vs.* John Dare Mg. Co., 6 *id.* 218; Overman Co. *vs.* American Mg. Co., 7 *id.* 312; Golden Fleece Co. *vs.* Cable Co., 12 *id.* 312; Lincoln *vs.* Rogers, 1 Montana 217; Nelson *vs.* O'Neill, 1 *id.* 284; Bucher *vs.* Mulverhill, 1 *id*, 306; Robertson *vs.* Smith, 1 *id.* 410; Atkins *vs.* Hendree, 1 Idaho 107; Gold Hill Mg. Co. *vs.* Ish, 5 Oreg. 104, *Copp's Mineral Lands* 454; Patterson *vs.* Hitchcock, 3 Colo. 533; Wolfley *vs.* Lebanon Mg. Co., 4 *id.* 112; Fitzgerald *vs.* Urton, 5 Cal. 308; Bridge *vs.* Underwood, 6 *id.* 215; Mitchell *vs.* Hargood, 6 *id.* 148; Sims *vs.* Smith, 7 *id.* 149; Merced Mg. Co. *vs.* Fremont, 7 *id.* 317; O'Keiffe *vs.* Cunningham, 9 *id.* 589; State *vs.* Moore, 12 *id.* 56; Merritt *vs.* Judd, 14 *id.* 60; Boggs *vs.* Merced Mg. Co., 14 *id.* 279; Henshaw *vs.* Clark, 14 *id.* 461; Clark *vs.* Duval, 15 *id.* 85; Smith *vs.* Doe, 15 *id.* 100; Pennsylvania Mg. Co. *vs.* Owens, 15 *id.* 135; Esmond *vs.* Chew, 15 *id.* 137; Brown *vs.* 49 and 56 Co., 15 *id.* 152; Gillan *vs.* Hutchinson, 16 *id.* 154; Coryell *vs.* Cain, 16 *id.* 567; Attwood *vs.* Fricot, 17 *id.* 38; English *vs.* Johnson, 17 *id.* 108; Fremont *vs.* Seals, 18 *id.* 433; Gore *vs.* McBrayer, 18 *id.* 582; Logan *vs.* Driscoll, 19 *id.* 623; Tunnel Co. *vs.* Stranahan, 20 *id.* 198; Rogers *vs.* Soggs, 22 *id.* 444; Gatewood *vs.* McLaughlin, 23 *id.* 178; Hughes *vs.* Devlin, 23 *id.* 501; Ensminger *vs.* McIntyre, 23 *id.* 593; Doran *vs.* Railway Co., 24 *id.* 245; Richardson *vs.* McNulty, 24 *id.* 339; Wixon *vs.* Bear River Co., 24 *id.* 367; Higgins *vs.* Houghton, 25 *id.* 252; St. John *vs.* Kidd, 26 *id.* 264; Depuy *vs.* Williams, 26 *id.* 309; Morton *vs.* Solambo Mg. Co., 26 *id.* 527; Hess *vs.* Winder, 30 *id.* 349; Tunnel Co. *vs.* Stranahan, 31 *id.* 387; Hardenburgh *vs.* Bacon, 33 *id.* 356; Gibson *vs.* Puchta, 33 *id*, 310; Levaroni *vs.* Miller, 34 *id.* 231; Hess *vs.* Winder, 34 *id.* 270; Pralus *vs.* Jefferson Mg. Co., 34 *id.* 559; Pralus *vs.* Pacific Mg. Co., 35 *id.* 30; Clark *vs.* Willett, 35 *id.* 535; Maine Boys Co. *vs.* Boston Co., 37 *id.* 40; Bradley *vs.* Lee, 38 *id* 362; Correa *vs.* Frietas, 42 *id.* 339; Harvey *vs.* Ryan, 42 *id*, 626; Gregory *vs.* Harris, 43 *id.* 38; Stone *vs.* Bumpus, 46 *id.* 218; Quirk *vs.* Tralk, 47 *id.* 453; Laird *vs.* Waterford, 50 *id.* 315; Titcomb *vs.* Kirk, 51 *id.* 288; Phœnix Co. *vs.* Lawrence, S. C. Cal. 1880, in manuscript. Decisions Com. G. L. O., Sept. 28, 1878, *Copp's Mineral Lands* 231; May 4, 1880, *id.* 276.

SEC. 391.—Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possesssion of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

17 Stat. 92; 19 *id.* 52; R. S. 2323. Tunnel Co. *vs.* Pell, 4 Col. 507; Titcomb *vs.* Kirk, 51 Cal. 288. Decisions Com. G. L. O. Sept. 20, 1872, *Copp's Mineral Lands* 90; April 15, 1873, *id.* 99; Aug. 1, 1873, *id.* 121; Nov. 3, 1876, 3 *Copp's L. O.* 130; Aug. 31, 1877, *Copp's Mineral Lands* 220; Jan. 16, 1878, *id.* 222; Oct. 12, 1878, *id.* 231.

SEC. 392. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location

must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the locations, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year: *Provided*, That the period within which the work required to be done annually on all unpatented claims, so located, shall commence on the first day of January succeeding the date of location of such claim. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the first day of January, eighteen hundred and seventy-five, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the tenth day of May, eighteen hundred and seventy-two, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. Upon a failure to comply with the foregoing conditions of annual expenditure, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made: *Provided*, That the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners, who have made the required expenditures.

17 Stat. 92; 18 *id.* 61, 315; 19 *id.* 52; 21 *id.* 61; R. S. 2324.

*Location, Record, and Evidence:* Campbell *vs.* Rankin, 9 Otto 261, *Copp's Mineral Lands* 418; Kinney *vs.* Con. Va. Mg. Co., 4 Saw. C. C. 382. Hibschle *vs.* Gildersleeve, U. S. Dist. Ct. Colo. 1880, in manuscript. Mallett *vs.* Uncle Sam Co., 1 Nev. 108; Van Valkenburgh *vs.* Huff, 1 *id.* 142; Chase *vs.* Savage Mg. Co., 2 *id* 9; Rogers *vs.* Cooney, 7 *id.* 213; Phillpotts *vs.* Blasdell, 8 *id.* 61; Weill *vs.* Lucerne Co., 11 *id.* 200; Golden Fleece Co. *vs.* Cable Mg. Co., 12 *id.* 312; Gleeson *vs.* Martin White Co., 13 *id.* 442; Roberts *vs.* Wilson, 1 Utah 292; Connor *vs.* McPhee, 1 Montana 73; King *vs.* Edwards, 1 *id.* 235; Bucher *vs.* Mulverhill, 1 *id.* 306; Territory *vs.* Lee, 2 *id.* 124; Moxon *vs.* Wilkinson, 2 *id.* 421; Murley *vs.* Ennis, 2 Colo. 300; Sullivan *vs.* Hense, 2 *id.* 424; Patterson *vs.* Hitchcock, 3 *id.* 533; Wolfley *vs.* Lebanon Co. 4 *id.* 112; Sears *vs.* Taylor, 4 *id.* 38; Hicks *vs.* Bell, 3 Cal. 219; Fairbanks *vs.* Woodhouse, 6 *id.* 433; Live Yankee Co. *vs.* Oregon Co., 7 *id.* 41; Packer *vs.* Hea-

ton, 9 *id.* 569; McGarrity *vs.* Byington, 12 *id.* 431; Water Co. *vs.* Mooney, 12 *id.* 534; Pennsylvania Mg. Co. *vs.* Owens, 15 *id.* 135; Lombards *vs.* Ferguson, 15 *id.* 372; Gillan *vs.* Hutchinson, 16 *id.* 154; Roach *vs.* Gray, 16 *id.* 383; Attwood *vs.* Fricot, 17 *id.* 38; English *vs.* Johnson, 17 *id.* 108; Prosser *vs.* Parks, 18 *id.* 47; Gore *vs.* McBrayer, 18 *id.* 582; Downing *vs.* Rankin, 19 *id.* 641; Tunnel Co. *vs.* Stranahan, 20 *id.* 198; Kelley *vs.* Taylor, 23 *id.* 11; Coleman *vs.* Clements, 23 *id.* 245; Maye *vs.* Tappan, 23 *id.* 306; Draper *vs.* Douglas 23 *id.* 347; Cary *vs.* Campbell, 24 *id.* 634; St. John *vs.* Kidd, 26 *id.* 264; Morton *vs.* Solambo Mg. Co., 26 *id.* 527; Wilson *vs.* Cleveland, 30 *id.* 192; Hess *vs.* Winder, 30 *id.* 349; Patterson *vs.* Keystone Mg. Co., 30 *id.* 360; Tunnel Co. *vs.* Stranahan, 31 *id.* 387; King *vs.* Randlett, 33 *id.* 318; Pralus *vs.* Jefferson Mg. Co., 34 *id.* 559; Pralus *vs.* Pacific Mg. Co., 35 *id.* 30; Bell *vs.* Tunnel and Mg. Co., 36 *id.* 214; Bradley *vs.* Lee, 38 *id.* 362; Hastings *vs.* Devlin, 40 *id.* 358; Harvey *vs.* Ryan, 42 *id.* 626; Strang *vs.* Ryan, 46 *id.* 33; Meyers *vs.* Farquharson, 46 *id.* 190; Quirk *vs.* Tralk, 47 *id.* 453; McLaughlin *vs.* Powell, 50 *id.* 64; Titcomb *vs.* Kirk, 51 *id.* 288; Morenhaut *vs.* Wilson, 52 *id.* 226; Stone *vs.* Geyser, 52 *id.* 315; Holland *vs.* M. A. G. Mg. Co., 53 *id.* 149; Gelcich *vs.* Moriarty, 53 *id.* 217; Phœnix Co. *vs.* Lawrence, Myers *vs.* Spooner, S. C. Cal., 1880. in manuscript. Decision Sec. Int., April 1, 1875, *Copp's Mineral Lands* 162. Decisions Com. G. L. O., May 16, 1873, *id.* 115; Aug. 28, 1876, *id.* 194; June 13, 1876, 3 *Copp's L. O.* 50; Oct. 20, 1879, *Copp's Mineral Lands* 259.

*Expenditures:* Mt. Diablo Mg. Co. *vs.* Callison, 5 Saw. C. C. 439. Decisions Sec. Int., Sept. 4, 1872, *Copp's Mg. Dec.* 136; March 4, 1879, *Copp's Mineral Lands* 237. Decisions Com. G. L. O., March 11, 1875, Skidmore, 47; Jan. 6, 1878, 5 *Copp's L. O.* 134 (?); Aug. 20, 1879, G. L. O. Rep. 1879, p. 144, *Copp's Mineral Lands* 255; Sept. 12, 1879, G. L. O. Report, 1879, 143; Oct. 20, 1879 *Copp's Mineral Lands* 259; May 1, 1880, *id.* 275.

*Abandonment and Forfeiture:* Hibschle *vs.* Gildersleeve, U. S. Dist. Ct. Colo. 1880, in manuscript; Mallett *vs.* Uncle Sam Co., 1 Nev. 188; Oreamuno *vs.* Uncle Sam Co., 1 *id.* 215; Weill *vs.* Lucerne Co., 11 *id.* 200; King *vs.* Edwards, 1 Montana, 235; Atkins *vs.* Hendree, 1 Idaho, 107; Murley *vs.* Ennis, 2 Colo.. 300; Fairbanks *vs.* Woodhouse, 6 Cal. 433; Davis *vs.* Butler, 6 *id.* 510; Ferris *vs.* Cooper, 10 *id.* 589; Waring *vs.* Crow, 11 *id.* 366; Glauckauf *vs.* Reed, 22 *id.* 468; Coleman *vs.* Clements, 23 *id.* 245; Richardson *vs.* McNulty, 24 *id.* 339; Wiseman *vs.* McNulty, 25 *id.* 230; St. John *vs.* Kidd, 26 *id.* 264; Depuy *vs.* Williams, 26 *id.* 309; Wilson *vs.* Cleveland, 30 *id.* 192; Bell *vs.* Tunnel and Mg. Co., 36 *id.* 214; Judson *vs.* Mulloy, 40 *id.* 300; Strang *vs.* Ryan, 46 *id.* 33; Morenhaut *vs.* Wilson, 52 *id.* 226; Myers *vs.* Spooner, S. C. Cal. 1880, in manuscript.

*Relocations:* Decision Sec. Int., Nov. 6, 1873, *Copp's Mg Dec* 191; May 22, 1878, 5 *Copp's L. O.* 50; June 29, 1878, 5 *id.* 66. Decision Com. G. L. O. Sept. 25, 1873, *Copp's Mg. Dec.* 225; April 21, 1876, 3 *Copp's L. O.* 37; Dec. 13, 1878, *Copp's Mineral Lands* 235.

*Transfers:* Mining Co. *vs.* Taylor, 10 Otto, 37. Kinney *vs.* Con. Va. Mg. Co., 4 Saw. C. C. 382. Phillpotts *vs.* Blasdell, 8 Nev. 61; Weill *vs.* Lucerne Co., 11 *id.* 200; Sullivan *vs.* Hense, 2 Colo. 424; McCarron *vs.* O'Connell, 7 Cal. 152; Clark *vs.* McElroy, 11 *id.* 154; Jackson *vs.* Feather River Co., 14 *id.* 18; Attwood *vs.* Fricot, 17 *id.* 38; Tunnel Co. *vs.* Stranahan, 20 *id.* 198; Gatewood *vs.* McLaughlin, 23 *id.* 178; Antonie Co. *vs.* Ridge Co., 23 *id.* 219; Draper *vs.* Douglas, 23 *id.* 347; Patterson *vs.* Keystone Co., 23 *id.* 575; Richardson *vs.* McNulty, 24 *id.* 339; Cary *vs.* Campbell, 24 *id.* 634; Copper Hill Mg. Co. *vs.* Spencer, 25 *id.* 18; St. John *vs.* Kidd, 26 *id.* 264; Duryea *vs.* Burt, 28 *id.* 569; Hess *vs.* Winder, 30 *id.* 349; Patterson *vs.* Keystone Mg. Co., 30 *id.* 360; Goller *vs.* Fett, 30 *id.* 481; Settembre *vs.* Putnam, 30 *id.* 490; King *vs.* Randlett, 33 *id.* 318; Hardenburgh *vs.* Bacon, 33 *id.* 356; Blodgett *vs.* Potosi Mg. Co., 34 *id.* 227; Felger *vs.* Coward, 35 *id.* 650; Meyers *vs.* Farquharson, 46 *id.* 190. Decision Com. G. L. O., June 9, 1873, *Copp's Mineral Lands* 116.

*Co-owners:* The 420 Mg. Co. *vs.* The Bullion Co., 3 Saw. C. C. 634, *Copp's Mineral Lands* 352. Mallett *vs.* Uncle Sam Co., 1 Nev. 188; Chase *vs.* Savage Co., 2 *id.* 9; Bucher *vs.* Mulverhill, 1 Montana 306; Murley *vs.* Ennis, 2 Colo. 300; Waring *vs.* Crow, 11 Cal. 366; Gore *vs.* McBrayer, 18 *id.* 582; Rowe *vs.* Bacigalluppi, 21 *id.* 633; Coleman *vs.* Clements, 23 *id.* 245; Hughes *vs.* Devlin, 23 *id.* 501; Wiseman *vs.* McNulty, 25 *id.* 230; Morton *vs.* Solambo Co., 26 *id.* 527; Duryea *vs.* Burt, 28 *id.* 569; Goller *vs.* Fett, 30 *id.* 481; Settembre *vs.* Putnam, 30 *id.* 490; Jones *vs.* Clark, 42 *id.* 180, Taylor *vs.* Castle, 42 *id.* 367; Decker *vs.* Howell, 42 *id.* 636; Strang *vs.* Ryan, 46 *id.* 33. Decisions Com. G. L. O., July 19, 1876, 3 *Copp's L. O.* 66; June 9, 1877, *Copp's Mineral Lands* 217; Dec. 21, 1877, *id.* 222.

SEC. 393. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation, authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United State surveyor-general, showing accurately the boundaries of the claim or claims which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of sixty days of publication the claimant shall file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established; and this provision shall apply to all applications for patents to mineral lands pending on the twenty-second day of January, eighteen hundred and eighty.

17 Stat. 92; 19 *id.* 52; 21 *id.* 61; R. S. 2325.

*Applications:* Decisions Sec. Int., Nov. 6, 1873, *Copp's Mg. Dec.* 191; March 22, 1875, 2 *Copp's L O.* 5; June 29, 1875, G. L. O. Rep. 1876, p. 78; Jan. 3, 1877, *Copp's Mineral Lands* 202. Decisions Com. G. L. O., Sept. 21, 1872, *id.* 120; Feb. 18, 1873, *id.* 122; March 24, 1873, *Copp's Mg. Dec.* 165; April 15, 1873, *id.* 188; Jan.

22, 1873, *id.* 157; Jan. 6, 1874, *Copp's Mineral Lands*, (1st edition), 146; July 21, 1874, 1 *Copp's L. O.* 66; Aug. 18, 1874, *Copp's Mineral Lands* 140; Dec. 14, 1874, 1 *Copp's Land Owner* 146; Jan. 2, 1875, *Copp's Mineral Lands* 154; Feb. 18, 1873, *id.* 92; Aug. 17, 1875, *id.* 177; Nov. 12, 1875, *id.* 181; Dec. 20, 1875, 2 *Copp's L. O.* 146; April 29, 1876, *Copp's Mineral Lands* 190; April 20, 1877, *id.* 217; Oct, 20, 1879, *id.* 259

*Agents and Attorneys:* Decision Sec. Int., March 2, 1880, *id.* 267. Decisions Com. G. L. O., Aug. 20, 1873, *Copp's Mg. Dec.* 222; Aug 26, 1879, 6 *Copp's L. O.* 92; Sept. 19, 1879, G. L. O. Rep. 1879, p. 143; Oct. 20, 1879, 6 *Copp's L. O.* 122.

*Expenditures:* Mt. Diablo Mg. Co. *vs.* Callison, 5 Saw. C. C. 439. Weaks' Mg. Laws, 113, 115, 116, 118, 120, 121. Decisions Sec. Int., Sept. 6, 1878, 6 *Copp's L. O.* 100; June 23, 1879, *Copp's Mineral Lands* 241.

*Notice:* Wolfley *vs.* Lebanon Co, 4 Colo. 112. Decisions Sec. Int., Dec. 5, 1871, *Copp's Mg. Dec.* 70; Nov. 24, 1873, *id.* 169; April 30, 1874, *Copp's Mineral Lands* 133; Jan 2, 1875, *id.* 154; April 1, 1875, *id.* 162; Dec. 1, 1876, *id.* 198. Decisions Com. G. L. O., June 19, 1871, *id.* 82; June 18, 1873, *id.* 117; Nov. 12, 1873, *Copp's Mg. Dec.* 234; July 21, 1874, 1 *Copp's L. O.* 66; Nov. 12, 1875, *Copp's Mineral Lands* 181; March 7, 1876, *id.* 187; April 29, 1876, *id.* 189; Dec. 1, 1876, *id.* 198; Jan. 4, 1877, *id.* 204; Aug. 26, 1879, 6 *Copp's L. O.* 92; Oct. 29, 1879, *Copp's Mineral Lands* 261; April 30, 1880.

*Payment:* Decision Com. G. L. O., Jan. 30, 1873, *Copp's Mg. Dec.* 157.

*Protestants:* Decisions Sec. Int., April 30, 1874, *Copp's Mineral Lands* 133; March 24, 1876, 4 *Copp's L. O.* 34; Feb. 17, 1877, *Copp's Mineral Lands* 204; March 10, 1877, 4 *Copp's L. O.* 3; July 21, 1879, *Copp's Mineral Lands* 245. Decisions Com. G. L. O., Aug. 17, 1874, 1 *Copp's L. O.* 82; Oct. 8, 1875, *Copp's Mineral Lands* 177.

*Patents:* Decisions Sec. Int., Jan. 14, 1873, *id.* 91; Jan. 2, 1875, *id.* 154; March 22, 1875, 2 *Copp's L. O.* 5; April 1, 1875, *Copp's Mineral Lands* 162; July 29, 1875, *id.* 176; July 21, 1879, *id.* 245. Decisions Com. G. L. O., Jan. 21, 1869, *id.* 75; July 22, 1869, *Copp's Mg. Dec.* 21; April 18, 1870, *Copp's Mineral Lands* 75; Jan. 2, 1872, *Copp's Mg. Dec.* 72; Feb. 27, 1872, *id.* 79; April 4, 1872, *Copp's Mineral Lands* 85; April 5, 1872, *id.* 87; Oct. 2, 1872, *Copp's Mg. Dec.* 146; March 8, 1873, *Copp's Mineral Lands* 97, 98; July 26, 1873, *Copp's Mg. Dec.* 213; Oct. 22, 1873, *id.* 227; March 14, 1874, 1 *Copp's L. O.* 2; June 22, 1875, 2 *id.* 98; Oct. 26, 1875, 2 *id.* 114; Dec. 20, 1875, 2 *id.* 146; Feb. 25, 1876, 2 *id.* 178; Jan. 15, 1880, 6 *id.* 171.

*Right of Purchase:* The 420 Mg. Co. *vs.* The Bullion Co., 3 Saw. C. C. 634, *Copp's Mineral Lands* 444; Chapman *vs.* Toy Long, 4 *id.* 28. Titcomb *vs.* Kirk, 51 Cal. 288.

*Surveys:* Decisions Sec Int., May 22, 1878, 5 *Copp's L. O.* 50; Sept. 6, 1878, *Copp's Mineral Lands* 230; Aug, 2, 1880. 8 Wash. Law. Rep. 540; Aug. 16, 1880. Decisions Com. G. L. O., April 17, 1873, *Copp's Mineral Lands* 100; Sept. 11, 1873, *Copp's Mg. Dec.* 223; Jan. 6, 1874, *Copp's Mineral Lands* (1st edition), 146; April 24, 1876, *id.* 189; Aug. 28, 1876, *id.* 194; April 10, 1877, 5 *Copp's L. O.* 51; Nov. 30, 1877, *Copp's Mineral Lands* 221; Oct. 20, 1879, *id.* 259; May 4, 1880, *id.* 276; June 17, 1880, 7 *Copp's L. O.* 51; Aug. 9, 1880, *Copp's Mineral Lands* 281.

SEC. 394. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim; and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll

with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever.

17 Stat. 93; 10 *id.* 52. R. S. 2326. The Eureka Case, 4 Saw. C. C. 302; *Copp's Mineral Lands* p. 352. Golden Fleece Co. *vs.* The Cable Co., 12 Nev. 312; Sears *vs.* Taylor, 4 Colo. 38. Decisions Sec. Int., March 11, 1872, G. L. O. Rep. 1873, p. 43; May 27, 1872, G. L. O. Rep. 1873, p. 19; Feb. 24, 1873, *Copp's Mg. Dec.* 101; Oct. 28, 1873, *id.* 161; Aug. 9, 1874, 2 *Copp's L. O.* 98; Sept. 9, 1874, 1 *id.* 98; Jan. 2, 1875, 1 *id.* 178; March 22, 1875, 2 *id.* 5; Feb. 12, 1876, 2 *id.* 178; Dec. 26, 1876, 3 *id.* 162; Feb. 17, 1877, 3 *id.* 195; Feb. 17, 1877, G. L. O. Rep. 1877, p. 129; April 17, 1877, 4 *Copp's L. O.* 34; Jan. 3, 1877, 3 *id.* 196; July 14, 1877, 4 *id.* 66; Sept. 27, 1877, G. L. O. Rep. 1877, p. 135; May 21, 1879, 6 *Copp's L. O.* 73; June 25, 1879, G. L. O. Rep. 1879, p. 148; July 17, 1879, *id.* 145. Decisions Com. G. L. O., Dec. 29, 1871, *Copp's Mg. Dec.* 76; Jan. 14, 1873, *id.* 156; June 9, 1873, *id* 202; Nov. 24, 1873, *id.* 145; July 21, 1874, 1 *Copp's L. O.* 66; Oct. 24, 1874, 1 *id.* 132; Dec. 14, 1874, 1 *id.* 146; May 12, 1876, 3 *id.* 36; Dec. 19, 1878, 5 *id.* 162; Sept. 12, 1879, 6 *id.* 105; Sept. 19, 1879, 6 *id.* 105; Feb. 28, 1880, 7 *id.* 50; April 15, 1880, 7 *id.* 51; June 28, 1880, 7 *id.* 50; July 15, 1880, 8 Wash. Law. Rep. 461. [NOTE.—Important rulings above mentioned can be found by date under Part III. herein.—EDITOR.]

SEC. 395. The description of vein or lode-claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

17 Stat. 94; 19 *id.* 52; R. S. 2327.

SEC. 396. Applications for patents for mining-claims under former laws now pending, may be prosecuted to a final decision in the General Land Office; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

17 Stat. 94; 19 *id.* 52; R. S. 2328.

SEC. 397. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode-claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

16 Stat. 217; R. S. 2329. Chapman *vs.* Toy Long, 4 Saw. C. C. 28. Moxon *vs.* Wilkinson, 2 Montana 421. Decision Sec. Int., March 4, 1879, *Copp's Mineral Lands* 237. Decisions Com. G. L. O., Feb. 12, 1872, *id.* 83; April 28, 1873, *id.* 101; April 25, 1874, 1 *Copp's L. O.* 18.

SEC. 398. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any *bona fide* pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any *bona fide* settler to any purchaser.

16 Stat. 217; R. S. 2330. Campbell *vs.* Adams, U. S. Dist. Ct. Colo. 1880, in manuscript. Decisions Com. G. L. O., March 1, 1871, *Copp's Mg. Dec.* 40; Jan. 20, 1873, *id.* 157; July 10, 1873, *Copp's Mineral Lands* 121; Oct. 23, 1873, *id.* 123; Nov. 20, 1873, *id.* 124; Nov. 21, 1874, *id.* 145; Sept. 20, 1879, *id.* 259.

SEC. 399. Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

17 Stat. 94; 19 *id.* 52; R. S. 2331. Campbell *vs.* Adams, U. S. Dist. Ct. Colo. 1880, in manuscript. Decisions Com. G. L. O., May 19, 1873, *Copp's Mineral Lands* 115; Aug. 27, 1873, *Copp's Mg. Dec.* 222.

SEC. 400. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to im-

pair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

16 Stat. 217; R. S. 2332. The 420 Mg. Co. *vs.* The Bullion Co., 3 Saw. C. C. 634; *Copp's Mineral Lands* 352; Davis *vs.* Clark, 2 Montana, 310; Maine Boys Co. *vs.* Boston Co., 37 Cal. 40.

SEC. 401. Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such a case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode-claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section three hundred and eighty-eight, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim, which does not include an application for the vein or lode-claim, shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode-claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

17 Stat. 94; 19 *id.* 52; R. S. 2333. Decision Com. G. L. O., Oct 17, 1873, *Copp's Mg. Dec.* 226.

SEC. 402. The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode-claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and receiver of the land-office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land Office.

17 Stat. 95; *id.* 52; R. S. 2334. Decision Com. G. L. O., Aug. 6, 1872, *Copp's Mineral Lands* 88.

SEC. 403. All affidavits required to be made under this chapter may

be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of the land, the testimony and proof may be taken as herein provided, on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

17 Stat. 95; 19 *id.* 52; R. S. 2335. Decisions Com. G. L. O., July 21, 1874, 1 *Copp's Land Owner* 66; Jan 27, 1876, *Copp's Mineral Lands* 187.

SEC. 404. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

17 Stat. 96; 19 *id.* 52; R. S. 2336. Decisions Sec. Int. Feb. 24, 1873, *Copp's Mineral Lands* 93; July 21, 1879, *id.* 245. Decision Com. G. L. O., Feb. 25, 1876, 2 *Copp's Land Owner* 178.

SEC. 405. Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no locations hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

17 Stat. 96; 19 *id.* 52; R. S. 2337. Decision Sec. Int., April 29, 1876, 3 *Copp's L. O.* 67. Decisions Com. G. L. O., Oct. 11, 1872, *Copp's Mineral Lands* 90; April 16, 1873, *Copp's Mg. Dec.* 193; May 20, 1873, *id.* 201; March 10, 1874, *Copp's Mineral Lands* 132; Oct. 21, 1875, *id.* 178.

SEC. 406. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

14 Stat. 252; 19 *id.* 52; R. S. 2338.

SEC. 407. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have

vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

14 Stat. 253; R. S. 2339. Atchison *vs.* Peterson, 20 Wall. 507; Basey *vs.* Gallagher, 20 *id.* 670; Jennison *vs.* Kirk, 8 Otto 453, *Copp's Mineral Lands* 471. Decisions Com. G. L. O., Nov. 23, 1869, *Copp's Mg. Dec.* 24; April 16, 1871, *Copp's Mineral Lands* 79; March 29, 1872, *id.* 84.

SEC. 408. All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

16 Stat. 218; R. S. 2340.

SEC. 409. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter eight, relating to "Homesteads."

14 Stat. 253; R. S. 2341. Ah Yew *vs.* Choate, 24 Cal. 562; Alford *vs.* Barnum, 45 *id.* 482. Decisions Sec. Int., Feb. 12, 1872, *Copp's Mg. Dec.* 77; May 6, 1872, *id.* 93; July 10, 1872, *id.* 128, 130; Dec. 14, 1872, *id.* 133; Jan. 3, 1876, 2 *Copp's L. O.* 146; Feb. 5, 1876, 2 *id.* 180; 3 *id.* 2; Dec. 20, 1876, 4 *id.* 102; April 5, 1877, 4 *id.* 19; June 21, 1877, 5 *id.* 3; Feb. 16, 1878, 5 *id.* 3; March 4, 1879, 6 *id.* 4; Dec. 22, 1879, 7 *id.* 23; April 7, 1880, 7 *id.* 36. Decisions Com. G. L. O., Nov. 14, 1872, *Copp's Mg. Dec.* 148; Oct. 21, 1871, *id.* 60; Dec. 2, 1872, *id.* 150; March 12, 1873, *id.* 163; July 10, 1873, *id.* 208; Nov. 11, 1873, *id.* 233; Aug. 4, 1875, 2 *Copp's L. O.* 84; Feb. 18, 1875, 1 *id.* 180; June 21, 1876, 3 *id.* 50; Oct. 24, 1876, 3 *id.* 130; March 21, 1877, 4 *id.* 2; March 26, 1877, 4 *id.* 17; Nov. 6, 1879, 6 *id.* 135. Cir. G. L. O. April 22, 1880, 7 *Copp's L. O.* 36. [Note.—Important decisions above mentioned can be found by date in Part III. herein.—EDITOR.]

SEC. 410. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

14 Stat. 253; R. S. 2342. Ah Yew *vs.* Choate, 24 Cal. 562; Alford *vs.* Barnum, 45 *id.* 482. Decisions Sec. Int., Feb. 12, 1872, *Copp's Mg. Dec.* 77; May 6, 1872, *id.* 93; July 10, 1872, *id.* 128 130; Dec. 14, 1872, *id.* 133; Jan. 3, 1876, 2 *Copp's L. O.* 146; Feb. 5, 1876, 2 *id.* 180; 3 *id.* 2; Dec. 20, 1876, 4 *id.* 102; April 5, 1877, 4 *id.* 19; June 21, 1877, 5 *id.* 2; Feb. 16, 1878, 5 *id.* 3; March 4, 1879, 6 *id.* 4;

Dec. 22, 1879, 7 *id.* 23; April 17, 1880, 7 *id.* 36. Decisions Com. G. L. O., Nov. 14, 1872, *Copp's Mg. Dec.* 148; Oct. 21, 1871, *id.* 60; Dec. 2, 1872, *id.* 150; March 12, 1873, *id.* 163; July 10, 1873, *id.* 208; Nov. 11, 1873, *id.* 233; Aug. 4. 1875, 2 *Copp's L. O.* 84; Feb. 18, 1875, 1 *id.* 180; June 21, 1876, 3 *id.* 50; Oct. 24, 1876, 3 *id.* 130; March 21, 1877, 4 *id.* 2; March 26, 1877, 4 *id.* 17; Nov. 6, 1879, 6 *id.* 135. Cir. G. L. O. April 22, 1880, 7 *Copp's L. O.*, 36. [Note.—Important rulings above referred to can be found by date, in Part III. herein.—EDITOR.]

SEC. 411. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

14 Stat. 252; R. S. 2343.

SEC. 412. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws, nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges, to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

16 Stat. 218; 17 *id.* 76; 19 *id* 52; R. S. 2344. Decision Sec. Int., Aug. 30, 1878, *Copp's Mineral Lands* 225. Decisions Com. G. L. O., March 8, 1873, *id.* 98; March 29, 1873, *Copp's Mg. Dec.* 179; May 27, 1876, 3 *Copp's L. O.* 34.

SEC. 413. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any *bona fide* entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption, as other public lands.

17 Stat. 465; R. S. 2345. Decision Com. G. L. O., July 21, 1876, 3 *Copp's L. O.* 132.

SEC. 414. Within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral are excluded from the operation of the preceding sections of this chapter, and all lands in said States shall be subject to disposal as agricultural lands.

19 Stat. 52.

SEC. 415. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirteenth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant; and all mineral lands are excepted from the operation and grants of laws heretofore granting lands to the State of Colorado.

13 Stat. 576; 18 *id.* 476; R. S 2346. Heydenfeldt *vs.* Mg. C., 3 Otto 634. *Copp's Mineral Lands* 464; Boggs *vs.* Merced Mg. Co., 14 Cal. 279; Burge *vs.* Smith, 14 *id* 380; Doran *vs.* Railway Co., 24 *id.* 452; Higgins *vs.* Houghton, 25 *id.* 252; McLaughlin *vs.* Powell, 50 *id.* 64. Decisions Sec. Int., May 24, 1870. *Copp's Mineral Lands* 76; April 28, 1873, April 30, 1879. Decisions Com. G. L. O., Feb. 5, 1879. 5 *Copp's L. O.* 178; Dec. 18, 1879, *Copp's Mineral Lands* 261. COAL LANDS: Sections 416 to 421 relate to coal lands. Section 416 is identical with section 2347 R. S., 417 with 2348. 418 with 2349, 419 with 2350, 420 with 2351, and 421 with 2352. References are: Stroud *vs.* Railway, 4 Dillon 396; 4 *Copp's L. O.* 170, and the department decisions on pp. 337 to 346 herein.

# INDEX.


PAGE.

**Abandonment.**
Digest of court decisions relative to..... 488
Where an adverse claim is for a relocation made prior to application for patent the question of, is for the courts..... 291
A certain judgment was *prima facie* evidence against..... 224
The, of surface-ground by applicant does not end a conflict..... 202
Evidence of, to secure forfeiture of interest of a tenant in common..... 523
Placing other names on the re-location notice is not necessarily an, of the first location..... 520
Until an, is established, a re-location cannot properly be made by other parties..... 224
What is an, of a prospecting and mining contract..... 493
Certain doctrines of, are not applicable to mines..... 512, 524
In case of, of a location under act of 1866 of 3,000 feet, and a relocation of 1,500 feet made, 3,000 feet cannot be again re-located under act of 1872..... 235
Re-location after, is admissible.... 520
In case of, a party may remove his ore and machinery..... 192
Of mines in New Mexico ..... 76
Of prospecting contract, effect of. 416
Certain evidence of, was insufficient..... 504
Omission of acts showing, indicate possession when..... 421
Question as to general belief as to, ruled out..... 505
What constitutes, of a tunnel location..... 335
Of undiscovered tunnel lodes, how evidenced..... 335
Effect of the, of a tunnel location. 222

**Abstract of Title.**
To be filed with application for patent, when..... 38
When, must be filed with the adverse claim..... 40
Copies of conveyance or an, and copy of location notice should be filed with an adverse claim... 123
A complete, is required in applications and adverse claims..... 154
A defective, defeats application for patent..... 135
An adverse claimant is not defeated by not filing an..... 124
Required in cases of Colorado relocations..... 175
Proceedings where the fact is shown that names were inserted on the location notice without owner's consent..... 219

**Act of July 26, 1866.**
Is not retroactive in its effects on prior patents..... 514

**Act of May 10, 1872.**
What is granted by the..... 508
Recognized as valid the locations made prior to its date..... 503
Allows application of statute of limitations..... 521

**Act of Congress.**
A local, must be strictly construed in favor of a uniform policy of the Government..... 510

**Acts of Congress—List of.**
July 26, 1866—Lode and Water Law.....18, 19, 20
July 9, 1870—Placer Claims...21, 22
May 10, 1872—General Mining Law—Revised Statutes..... 1
February 18, 1873—Michigan, Wisconsin, and Minnesota excepted..... 23
March 1, 1873—Annual Expenditure..... 23
June 6, 1874—Annual Expenditure..... 23
February 11, 1875—Tunnel Amendment..... 24
March 1, 1876—Annual Expenditure ..... 23
May 5, 1876—Missouri and Kansas excepted..... 24
January 22, 1880—Agents—Annual Expenditure..... 24
March 3, 1881—Suits at Law..... 25
July 25, 1866—Sutro Tunnel..... 25
June 3, 1878—Timber Cutting.... 27

PAGE.
June 3, 1878—Sale of Timber and Stone Lands..... 28
January 12, 1877—Saline Lands... 29
March 3, 1873—Coal Lands—R. S. 2347 to 2352..... 13
July 1, 1864 and March 3, 1865—Coal Lands..... 30
**Actual Mining Claim.**
Definition of..... 87
**Actual Possession.**
What is..... 371
**Adjoining Land.**
Is sold subject to what conditions. 93
**Administrator.**
An, may institute proceedings in ejectment for quartz claims..... 524
**Admission.**
What may be secured in an adverse claim..... 132
**Adverse Claim.**
Form of..... 535
Digest of court decisions relative to..... 490
Interested parties alone can assert an..... 84
When and how, must be presented and adjudicated..... 6, 39, 40
To placer-claim, how treated..... 42
When, is presumed not to exist... 5
Is sufficient if the owners properly allege ownership..... 124
Any state of facts which shows that the party alleging the same has a better right than the applicant is the proper subject matter of an adverse claim..... 146
Cannot be amended to embrace more land..... 91
Copies of conveyances or an abstract of title and copy of location notice should file with an.. 123, 154
Cannot be defeated by the omission to file an abstract of title... 124
Exhibit professing to represent the survey of an, must be attached to the protest..... 143
Proceedings where survey cannot be procured..... 331
Jurat to the, how made..... 124
How sworn to..... 133
Must be sworn to by the party, not by an attorney..... 218
Of an incorporated company, how sworn to..... 144
To be considered must be filed during period of publication.... 178
To be filed with Register and Receiver during publication of notice.....
To be filed within sixty-three days where notice is published in a weekly paper..... 261
How, is affected by republication of notice..... 272
The filing of an, with the Register is sufficient..... 124
The period within which an, may be filed cannot be lengthened or abridged..... 257
A stipulation that an, may be filed within twenty days after the expiration of publication of notice, is void..... 257
When an, is withdrawn and filed later, the latter date is the date of filing..... 209
When an, may be filed on Sunday or out of office hours..... 245
Fees for filing an..... 15
Effect of not filing an..... 352
How an, is terminated..... 202
Papers filed as an, cannot be withdrawn..... 137
How an, may be waived..... 137
When all but one co-tenant withdraw an, the court must decide the controversy..... 92
When application is withdrawn for portion embraced by the, and judgment is confessed in court, patent may issue..... 204
A certain stipulation was a waiver of the..... 146
Consideration of the waiver filed in case of the Antelope Lode.... 162
A conflicting survey already patented cannot as an, delay an application for patent..... 178
When surface rights do not conflict the possibility of future union does not constitute an.... 93
Foreign corporations cannot set up an, to what..... 80
A public highway cannot be an... 83
Received by mail but on which the required fees are not paid, will be treated as a protest..... 191
Rejected because not properly made out..... 113
Rejected because not sworn to within the land district..... 97
Rejected because filed against three applications..... 116
Rejected because no interest was shown..... 116
Rejected because suit was commenced in a court within whose jurisdiction the claim is not situated..... 257
Will not be rejected because the persons composing an unincor-

PAGE.
porated company when suit is commenced are not the same as when the, was filed..... 128
Proceedings in an, to a placer-claim are the same as in lode-claims..... ..... 42
In absence of, certain evidence of possession is sufficient to secure right to placer patent..... 8
Mineral lands will not be indefinitely suspended from sale by the mere filing of a complaint; the, must be prosecuted with diligence ..... ..... 279
If suit be commenced by a party who subsequently filed an, proceedings will be stayed..... 146
The matter in dispute is all that the court can pass upon in an... 162
Where applicant fails to pay for his tract for a time within which an adverse location could attach he can only protect his interest by filing an, when..... 296
A lot of land on which is an arastra may be an..... 490
A tunnel location may be an, and should then be asserted like other adverse claims..... 318
Locators' rights on lode-claims in absence of..... .... 3
Under act of 1866..... 20
Surface rights, how limited by, existing May 10, 1872..... 33
The enlargement of rights in claims located prior to May 10, 1872, is subject to any..... 31
Proceedings where an, filed in the local office prior, was received at the General Land Office after, issue of patent..... 91
What is included in a vein or lode location in the absence of..... 3
All papers in the nature of an, may be examined by the applicant for patent..... 98
Jurisdiction of the local officers over an..... ..... 98
What admission of right may be received in an.. ..... 132
Proceedings under act of 1866... 5, 20
A pending suit brought on an, will not excuse the annual expenditure..... 255
Where the, is the consequence of a re-location made prior to application, the question is one for the courts..... 291
Where the re-location was made after application, the land department must decide..... 291
Where a party failed to file an, he cannot apply for the ground included in an application..... 286
Every, is meant in Utah statutes 490
Under timber and stone law—how adjudicated ..... 28
How made and adjusted under timber and stone act of 1878.... 66
To coal lands, how adjudicated... 70

**Adverse Claimant.**

Is not required to show affirmatively that he has complied with the local laws..... ..... 128
Must make survey of his entire claim; he cannot color part of the applicant's survey..... 148
When the, has failed to commence suit, the applicant must show that fact..... 235
Must commence his suit in the manner contemplated by the statute..... 279
When, cannot bring second suit... 137
The, in a certain case shows the nature, boundaries, and extent of his claim..... 273
Consideration of the minority of an..... 116
Cannot be defeated by a suggestion of irregularity in official conduct..... ..... 148
The diligence of an, in prosecuting suit is a question for the courts to decide..... 243
The abandonment of surface by the applicant does not end the suit brought by an; the court must decide..... ..... 202
Because an, obtains judgment he is not thereby entitled to patent. 162
Must commence suit in time; if he trusts to the mails he must take the consequences.. ..... 214
Where the, fails to commence suit through the unadvised or corrupt action of his attorney, the Interior Department can offer no redress..... 214
The decision of a court that the, has no right in the disputed premises is final. He cannot thereafter claim the land is agricultural in character..... 187
Remedy of a certain, is in a court of equity..... 212
Where, prevented discoverer from doing assessment work—Effect. 394

**Adverse Possession.**

Digest of court decisions affecting. 490
Title to public mineral land cannot pass by..... 510
May be shown for the period pre-

PAGE.

scribed by the statute of limitations..... 521
In case of one against another cotenant..... 528

**Adverse Rights.**
In absence of, pending applications under prior laws will secure all rights conveyed by present laws..... 6, 7
Pre-emption entries of coal land are subject to..... 71
Lode locations are less than fifty feet wide when certain, exist.... 2
When hearing may be ordered to investigate, in mining conflicts. 318
All, to mines and tunnel locations may be adjudicated in court..... 318

**Affidavit.**
*Ex parte*, may be received in applications for patents..... 74
How verified in mining cases..... 10
Required of applicant for patent... 37
Any, required of an applicant for patent may be made by his agent..... 24
Of applicant for patent as to his possessory right.....37,38
Of posting notice of application for patent when made..... 4
Of claimant that plat and notice remained posted..... 38
Of posting, how made in absence or death of parties who posted it..... 123
Of continuous posting on claim, how and when made..... 154
Of publication of notice may be filed, notwithstanding an adverse claim..... 6
Required of applicant for patent after expiration of period of publication.....5, 39
When, of publisher of newspaper should be presented at hearing to determine character of land.. 48
Form of, of citizenship..... 534
Of an individual is sufficient proof of citizenship..... 2
Of an authorized agent is proof of citizenship of an association.... 2
What is shown in, to prove citizenship..... 194
Of citizenship, how made..... 45
Of naturalized citizen, when required..... 45
How made in proof of citizenship 2
When, of citizenship must be sworn to within land district.... 267
Every, except of citizenship, may be made by agent..... 65
How made under act of January 22, 1880..... 24

PAGE.

Applicant for patent must make, as to fees and charges.....10, 39
Every, may be verified, how.. 9, 47, 53
Required in hearings to determine character of land.....47, 56
Where an officer's jurisdiction extends within a land district he may administer oaths outside such district in applications.... 208
Non-mineral, required in certain proceedings touching certain lands claimed by the C. P. R.R. Co..... 280
Of claimant when mine is outside any organized district..... 90
That no known veins are in a placer-claim to be filed with application for patent, when..... 41
Of parties familiar with the facts will be received to show value of improvements where placers embrace legal subdivisions..... 124
Form of, of $500 expenditure..... 533
Of party against delinquent co-owner..... 217
Form of, of failure to contribute.. 528
Contents of, required in case of loss of Receiver's receipt..... 75
The non-mineral, may be made by agent in coal and land cases.... 73
Required under the timber act of June 3, 1878.....65, 66
What, may be received in coal cases .....69, 70, 71, 72, 73

**Agent.**
Digest of court decisions relative to..... 491
Application for patent, how made by..... 24
Residents of a district temporarily absent may apply for patent by. 267
Act of January 22, 1880, relative to, of applicants..... 24
Corporation must act through its officer or agent..... 144
Proof of citizenship when made by 2, 45
May make all affidavits except of citizenship..... 65
Must prove agency when offering proof of citizenship of an unincorporated association..... 234
Verbal authority to an, is sufficient for locating mines..... 496
A party may be in possession by.. 518
A board of directors cannot grant to an, an irrevocable power..... 491
Removing an, does not change possession..... 491
Effect of ratifying contract made by..... 514
A member of a partnership cannot bind his company by a contract

PAGE.
with an attorney when..... 514
May make non-mineral affidavit in coal cases..... 73
Coal lands may be possessed by... 70
**Agreement.**
Form of, of publisher ..... 532
**Agreement in Escrow.**
Form of..... 541
**Agricultural Claim.**
Digest of court decisions relative to..... 491
Certain improvements on an, will be protected against the miner. 524
Prior to the mining-claim, takes the timber..... 523
May exist on the surface and another title exist to the minerals. 524
What mineral evidence will not invalidate a patent for an..... 514
**Agricultural Claimant.**
Miners in contest with an, may be confined to original locations... 100
The burden of proof is upon a, who would disprove the mineral return of land..... 161
How a contest between miners and an, may be reopened..... 87
What timber an, may cut..... 28
Burden of proof should be upon, when only ..... 324
**Agricultural Entry.**
May be suspended to await mining developments ..... 161
**Agricultural Lands.**—*See Non-mineral Land.*
Hearings to determine character of land.....10, 46, 53, 56, 57, 58
Clearly, in mining may be set apart..... 101
Under act of 1866..... 20
In mineral regions, open to homesteads..... 12
Mineral lands in certain States are sold as.....23, 24
The failure of government surveyors to separate mineral from agricultural lands cannot defeat miner's rights..... 454
The relief afforded miners whose lands have been included in a patent for..... 454
In segregating mineral land less than forty acres of, that remain may be entered for homestead or pre-emption purposes..... 8
*Bona-fide* settlers upon, in mineral regions are protected..... 7
Clearly, may be set apart in mining regions for pre-emption and homestead entry..... 12
Segregation of mineral from..... 47
Satisfactory evidence that a tract is 87
Only clear and positive proof can overcome the mineral return of land in the neighborhood of valuable mineral deposits..... 274
A patent for, does not pass title to known mines ..... 454
A defeated adverse claimant to mining ground cannot assert that the tract is..... 187
Whether a tract is mineral or, is a question of fact, irrespective of how it has hitherto been sold 263
A tract not, may be sold for mining purposes in connection with placer-claims..... 186
Proceedings where parties desire to select or enter, returned as mineral, under other than homestead or pre-emption laws..... 58
Homestead and pre-emption claims on, are not defeated by placer-claims..... 7
Proceedings required of the C. P. R.R. Co. to prove certain lands to be..... 280
Revocation of withdrawal of certain alleged mineral lands..... 56
**Agricultural Patent.**
Does not convey known mines... 176
Excepting clause in, relative to water rights..... 176
Minerals discovered after issue of, belong to the agriculturist..... 121
**Alaska.**
Status of mining locations in..... 122
**Alien.**—*See Citizen.*
Digest of court decision affecting an ..... 491
Cannot hold a mining-claim prior to patent ..... 188
Adverse claims cannot be asserted by an, to unpatented ground... 80
The portion of a mine sold to an, cannot be patented until his intention is declared..... 192
Re-location when the locator is an, is admissible..... 519
When the co-locators of an, do not lose their claim..... 508
Locators and intermediate owners will not be presumed, prior to issuance of patent in absence of allegation or proof..... 162
How naturalized..... 370
Joint location by, and citizen, how treated..... 371
**Alienage.**
Proof of, must be affirmatively shown by the adverse claimant, when ..... 154
**Alum Deposits.**
May be patented..... 52

PAGE.

**Amador, California.**
Proceeding in townsite case of.... 101
**Amendment.**
What, of an adverse claim cannot be made..... 91
**Amicus Curiæ.**—*See Protestant.*
**Annual Expenditure.**—*See Expenditure Annual.*
**Angles.**
Vein may be followed on its.....2, 5, 20
**Apex.**
Definition of, of vein..... 505
Of a vein must lie within surface lines.....3, 15
Of every lode claimed must be within location lines ..... 32
When junior location has, senior location on dip will hold..... 410
**Appeals.**
Right of, from decisions of local officers in adverse claims..... 98
Additional proof cannot be received on..... 99
A protestant has no right of...204, 214
Until the question of, is settled a second and adverse application will not be received for ground included in a rejected application..... 286
Only the applicant can take an, from the Surveyor-General's approval or disapproval of a survey..... 281
In contested coal cases..... 71
**Applicant for Patent.**
Sworn statement of, attached to field-notes..... 37
May apply by agent..... 24
The acts of an attorney are the acts of the, when..... 202
Assumed entitled if no adverse claim is filed..... 5
Duty of..... 5
Under act of 1866.....5, 18
When, must swear to citizenship affidavit within land district..... 267
May employ any deputy surveyor. 45
Must file statement of charges and fees with local officers.....10, 46
Need not give personal notice..... 79
The rights of the, cannot be sustained by acts subsequent to the filing of an adverse claim..... 490
Should not suffer through neglect of any officer..... 163
The objection that, did not have title at date of application is insufficient unless clearly proved. 163
Contracts for conveyance are sufficient, if full title was acquired before issue of patent..... 163
An action in equity to restrain an, from further prosecution of his claim cannot be noticed by the General Land Office..... 158
Where the, relinquishes the portion in dispute, further proceedings before the Interior Department will not be stayed..... 163
The abandonment of surface ground by the, does not end the suit brought by an adverse claimant..... 202
When the adverse claimant fails to properly commence suit the, must show that fact..... 235
Cannot embrace a lode and non-contiguous placer-claim in one application..... 236
Must continue the annual expenditure while suit is pending..... 255
Must show that he or grantors made the expenditures on relocated mines..... 161
Proceedings after suit has been decided in favor of..... 123
Who bases his claim upon the statute of limitations is not excused from publishing notice..... 259
The name of every, must appear on the entry papers where an unincorporated company applies for patent..... 122
May sell his mine and the purchaser's names be substituted in application..... 154
May examine any and all papers filed in the nature of a protest. 98
What must be filed by an, in case of Colorado re-locations..... 175
Patent may issue to assignee of... 97
When copy of judgment roll must be filed by..... 6
$500 expenditure is not required where placer, bases his right to patent on statute of limitations. 312
Where, fails to pay for his tract for a time within which an adverse location could attach, how he can protect his interests..... 296
Hearing may be ordered to determine if, has complied with the law or is not entitled to patent, as in agricultural cases..... 318
**Application for Patent.**
Form of..... 529
A claimant need not make an..... 409
Under former laws may be prosecuted to final decision and shall secure rights under present laws 7
Fees for filing an..... 16
Proceedings under an..... 4
Proceedings under section 2326.. 6
How conducted under act of 1866. 5, 18

PAGE.
Land-office rules as to, for lode-claims ... 37
Residents of a district temporarily absent may make, through an agent ... 267
An, signed by one joint owner when recognized as the application of all ... 202
Will remain suspended where one of the co-tenants, an alien, refuses to become naturalized ... 192
Should show in material particulars compliance with the local and United States laws ... 199
The time or order of presenting proof of compliance is secondary to the proof itself ... 199
Identity of land located and applied for must be shown ... 249
An abstract of title is required with an ... 154
The plat posted on the claim must be a copy of the one filed with the ... 154
*Ex parte* affidavits may be received in an ... 74
Where an officer's jurisdiction extends into a land district he may administer oaths outside such district in an ... 208
How made by agent ... 24
Irregularly made, may be submitted to the Board of Equitable Adjudication ... 198
Cannot embrace several lode-claims ... 177
The land officers are presumed to do their duty as to an ... 352
When a mine is located in two land districts ... 181
Proof required where proceedings have been had against delinquent co-owner ... 217
No person out of possession can make an ... 255
Compromise where an, conflicts with another ... 140
The surveyor is not required to trace the course of a lode in an. 514
A survey does not withdraw land from sale unless followed by an. 217
Denied where survey did not agree with ... 83
When, for uncontested portion of a lode-claim may proceed ... 84
When, must be suspended except what ... 40
Where a, has been rejected, a second and adverse, for the same ground cannot be received, until when ... 286
A second, for land already applied for and undetermined should not be received by the local officers ... 283
Where a re-location made prior to date of, is the basis of an adverse claim the courts must decide ... 291
When, is withdrawn for portion in conflict and judgment is confessed in court, patent may issue ... 204
The land department has jurisdiction over the matters of form; the courts over the merits of a case ... 199
An examination of an, should extend to the general records of the General Land Office ... 137
Should not be indefinitely suspended to await future developments ... 93
Cannot be delayed by a conflicting survey already patented ... 178
What proof in, may be filed after filing of adverse claim ... 40
Defective proof in an, considered. 291
Proceedings in cases of divided and undivided interests ... 92
Rejected because notice was published without knowledge of register, and not in newspaper published nearest the claim, record title was defective, and previous application covered the same premises ... 135
Rejected because the claim was not legally located ... 119
Rejected because of insufficient notice ... 117
Proof required in an, for placer ground ... 42, 43
Certain proofs in an, for placer mine called for ... 180
Proceedings to make, for several placer tracts ... 78
For placer-claim including a vein or lode ... 9, 42
When a lode discovered in a placer-claim does not affect ... 312
One, may embrace 327 acres of placer land ... 121
For placer-claims, may embrace several tracts or locations ... 145
Where a mill site is within land embraced in an, for a placer-claim, a hearing may be had to determine sundry facts ... 222
May include non-contiguous tract for mill site ... 11, 44
For mill site, how conducted ... 43
For quartz mill and reduction works, how made ... 44

PAGE.

**Appropriation.**
The abandonment of one party is not to another's benefit without. 491
**Arbitration.**
A question of mining property cannot be submitted to..... 524
**Arizona.**
Locations in, considered..... 119
Local officers in, receive extra fees..... 16
Timber cutting in, authorized by act of June 3, 1878..... 26
Saline law of 1877 does not apply to..... 68
**Asphalt Deposits.**
May be patented..... 52
**Asphaltum.**
Is a mineral..... 510
**Assay.**
What, is evidence of a mineral vein..... 503
**Assessment.**—*See Expenditure.*
Failure to pay annual, indicates abandonment.....488, 489
**Assignees.**
Patent may issue to, of applicant. 97
Have same right as locators..... 3, 4
**Assignment.**
Of patents, how effected..... 75
Of coal entry certificate will be recognized..... 73
Coal land rights are subject to.... 73
**Assignor.**
An, cannot transfer a greater right than he possesses..... 188
**Association.**
Location by, after May 10, 1872, on veins.....33, 37
May enter placer-claims..... 9
Application by an incorporated and an unincorporated..... 122
Possession by one member is by the entire..... 516
Not more than 3,000 feet on a vein could be located by an, under act of 1866.....2, 19
Proof of citizenship of an.....44, 45
An unincorporated, owning separate placer locations, may unite their means, and, expending the required $500 at one point, secure patent..... 180
May secure patent for contiguous placer tracts..... 7
Articles of, must be strictly construed against forfeiture..... 499
Because the stock of an unincorporated, has passed to other persons, is not sufficient cause to exclude an adverse claimant for not being the same person who filed the adverse claim..... 128

PAGE.

An, may enter coal lands, how .. 13, 15, 69
May make entry under timber and stone law..... 66
**Assumpsit.**
When a partner can bring an action of, or ejectment..... 520
**Attorney.**—*See Agent.*
A local officer cannot act as an.... 492
Deputy surveyor cannot act as, for claimant..... 63
Form of power of..... 534
The jurat to an adverse claim cannot be made by an..... 124
Cannot swear to an adverse claim. 218
The acts of an, are the acts of the claimant when..... 202
Case lost through action of..... 75
A dishonest or corrupt, will be debarred from practice before the Executive Departments..... 215
Residents of a district temporarily absent may apply for patent through an..... 267
**Bill of Sale.**—*See Conveyance, Sale.*
Evidence necessary under an unrecorded..... 517
**Black Hills Mines.**
Locations of, before Feb. 28, 1877, should be re-located..... 212
When old locations in the, are valid..... 492
**Blind Lodes.**—*See Tunnel Lodes.*
How and by whom prospected.... 90
How, are possessed and claimed... 526
No surface can be recovered in a suit for a..... 508
Surface ground for, may be recovered when..... 522
An uncertain conveyance of a..... 495
**Board of Directors.**—*See Corporation.*
**Bond.**
Surveyors must give..... 61
Digest of court decisions relative to mining..... 492
**Borax.**
May be patented under the mining law..... 52
Deposits of, may be patented as mines..... 100
**Boundaries.**
Digest of court decisions relative to..... 492
Of a district may be changed..... 497
No lateral, were often located in 1865..... 497
Of lode-claim, how marked..... 34
Reasonable time should be allowed to define..... 522
What was considered a sufficient marking of certain.....503, 522

PAGE.
Where, are marked, possession of part is possession of whole..... 518
Must be accurately shown by plat filed with application for patent. 4
Of an adverse claim, how shown. 40
Of tunnel location, how marked... 36
Of ground for tailings must be defined..... 522
**Burden of Proof.**
Upon whom, rests in agricultural or mineral contests..... 57
Is upon the agriculturist who seeks to disprove the surveyor's mineral return..... 161
In case of minerals in California.. 509
Upon whom, should rest in determining character of land..... 56
When, should be upon agricultural claimants..... 324
On plaintiff as to ore and continuation of lode, when..... 410
Upon whom where locator claims a full location..... 511
**By-Laws.**
Form of, of mining corporation.. 544
**California.**
The grant of school lands to, does not embrace mineral lands ..... 458
The, school grant is in the nature of a float..... 101
Mineral lands were not granted to, by act of March 3, 1853.....8, 101
Repeal of part of act of March 3, 1853, relative to surveys in mineral regions of..... 8
The State cannot make selections in lieu of sections lost because mineral in character..... 224
School sections in, containing coal 340
Penalty for offences concerning mineral lands in.....17, 18
Public surveys in, and Michigan contrasted..... 101
When a tract in, contains mineral.. 509
Possession must be shown to sustain an action under section 254, practice act of..... 517
Parol sale formerly conveyed title in..... 518
Act of, relative to conveyances in 494
Easement law of 1870..... 520
Interpretation of Nevada county rules in..... 508
Local officers in, entitled to extra fees wherein..... 16
A case of ownership of a mine and quartz mill in..... 525
Sale of timber lands in..... 27
Timber cutting in, authorized by act of June 3, 1878..... 27
Instructions under timber and stone act of 1878..... 65

PAGE
Saline act of 1877 does not apply to..... 68
**Canals.**
Right of way for, is granted..... 11
Act for benefit of, and ditch owners, of July 26, 1866..... 18
**Carbonate of Soda.**
May be patented under the mining law..... 52
**Caveat Emptor.**
The rule of, applies to sales under execution.....511, 512
**Cement Claim.**
May be patented as a placer-claim. 83
**Central Pacific Railroad Company.**
Salt deposits are excepted from grants similar to that of the..... 336
Mill site on a tract belonging to the. 90
Proceedings to establish non-mineral character of certain lands within grant to..... 280
Mineral lands do not pass to the... 144
**Certificate of Location.**—*See Location.*
**Certificate.**—*See Expenditure.*
Of surveyor as to value of improvements on adverse claim... 40
Of Surveyor-General as to $500 expenditure to be filed with application for patent..... 5
Of Surveyor-General as to improvements, how made..... 38
To be attached to field-notes of mining surveys.....60, 61
Of improvements, how made when placers are on legal subdivisions..... 124
Form of, that no suit is pending.. 534
Of clerk of court as to litigation touching a placer-claim..... 43
When copy of statute of limitations must be filed with certificate of clerk of court..... 43
Of deposit, for survey, when made. 45
Of deposit for surveys will not purchase coal lands..... 342
Of location, when issued by the local recorder..... 34
**Certificate of Stock.**
Form of..... 547
**Charges.**—*See Fees.*
For surveys and publication, land-office rules.....45, 46
**Charter.**
Filing copy of, is proof of citizenship of a corporation..... 2
A copy of the, must be filed in applications by incorporated companies..... 122
**China Clay.**—*See Kaoline.*
Is a mineral..... 510
**Cinnabar.**
Is found in rock in place..... 83

PAGE.

Veins only of gold, silver, copper and, could be patented under act of 1866.....15, 19
Extent of claims of, on veins..... 2
Under act of 1866..... 19
Timber lands containing, not subject to sale.....27, 65

Circular Instructions.—*See Table of Contents in front of book.*

Citizen.
And those who have declared, may explore, occupy, and purchase mineral deposits.....1, 18
Mineral lands can be purchased by a..... 31
When a corporation is a..... 371
A foreigner may make and dispose of a location provided he became a, before disposing of it. 154
Only, can locate mining-claims... 370
How aliens are naturalized..... 370
Joint location by, and aliens, how treated..... 371
Corporation when deemed..... 371
Any, may enter coal lands, how.13, 69
Coal lands worked by, how treated 30
Only a, or one who has declared his intention, can purchase timber and stone lands..... 27

Citizenship.
Proof of, how made..... 2
Under act of 1866..... 19
Land-office rules as to.....31, 33, 44
Form of affidavit of..... 534
Agency must be proved where, is evidenced by agent..... 224
When, cannot be proved by agent. 65
Applicant's affidavit of, must be sworn to within land district.... 267
Proof of, by a soldier..... 88
If, be properly alleged, the law is complied with..... 146
Proof of, under Secretary's ruling of July 29, 1876..... 194
Proof of, where claimant's father was naturalized..... 88
How proved under timber law of 1878..... 65
In coal land entries.....13, 69

Claim.—*See Mining-Claim.*

Claimant.—*See Applicant for Patent—Agricultural.*

Clay.—*See Kaoline.*
Fire, may be located and patented..... 121
China, is a mineral..... 510

Clay Pits.
When, constitute a mine..... 509

Clerk of Court.—*See Certificate.*
Must attest official character of officer not using a seal when hearing is had before such officer..... 49

Coal.
Timber lands containing, are not subject to sale.....27, 65
Is a mineral..... 343

Coal Lands.
Pre-emption and entry of.....13, 14
Instructions relating to sale of.... 69
Rulings relative to.....337, 346
Laws of July 1, 1864, and March 3, 1865..... 30
Are excluded as mines from pre-emption..... 30
Only one declaratory statement for, is permitted..... 343
Include every kind of coal..... 345
What determines price of..... 345
Are mineral lands..... 343
Are "mines."..... 30
Where right to, had attached prior to definite location of railroad.. 340

Colorado.
Local officers in, receive extra fees..... 16
Cannot take mineral school sec-Sections..... 261
Sections after admission of, not known to contain mineral at date of survey, pass to the State..... 261
School sections in, containing coal..... 340
Decisions affecting local rules in. 508
Proof required in, re-locations.... 175
The, law relative to discovery-shaft is not annulled by the act of Congress of January 22, 1880..... 290
A question of expenditure on a location in, under act of 1880 considered..... 295
Discovery-shaft, how deep, to secure rights in..... 410
Effect of failure to record location under laws of..... 503
A certain location certificate in, is void for uncertainty..... 504
Locations in, made in 1860, considered..... 506
Location under the, act of February 9, 1866, recorded after July 26, 1866..... 140
Salt springs and deposits in..... 333
Citizens of, may cut timber..... 26

Commissioner of the General Land Office.
May prescribe the maximum charges for surveys and publication of notices..... 9

PAGE.
Proceedings after judgment roll is filed in the local office are to be certified to the..... 6
Instructions to mineral surveyors in States where the, is *ex-officio* Surveyor-General..... 161
Duty of, on finding lands to be saline..... 29
May make all needful rules under the coal laws.....14, 69
To be notified of unauthorized timber cutting..... 26
Regulations to be prescribed by, under timber act of 1878..... 28
**Commissions.**
List of, allowed registers and receivers..... 15
**Company.**—*See Association.*
**Compensation.**
Should be paid for right of way over mines, etc..... 520
**Compromise.**
Where two applications conflict... 140
**Compromise Line.**
How a certain, between two companies is construed.....352, 365
**Comstock Lode.**
Early conveyances of the, was by transfer of possession..... 516
Status of, certain claims near..... 302
Act of July 25, 1866, relative to Sutro Tunnel..... 25
Rights of A. Sutro for tunnel to, protected..... 12
Clause inserted on patents for claims on or near the..... 98
In what patents the Sutro Tunnel clause should be inserted..... 225
Hearings may be had to determine facts in connection with Sutro Tunnel..... 197
The Sutro Tunnel grant includes lands west of..... 302
**Congress.**—*See Thirty-eighth Congress.*
**Contest.**—*See Hearings.*
How a, between miners and agriculturist may be reopened..... 87
As to character of land, where held. 10
**Contestant.**
Is a party to a certain contest, for what purpose..... 133
**Contract.**—*See Partnership.*
Digest of court decisions relative to..... 493
Change of names in location notice in violation of..... 513
Mechanics' lien on a mine under a 500
When party is liable under a, for royalty where option was granted..... 500
Abandonment of, how shown, and effect..... 416

PAGE.
**Continuance.**
How an affidavit for a, can become a part of the record in a case..... 413
**Conveyance.**—*See Abstract of Title.*
Form of..... 539
Digest of court decisions relative to..... 494
Proof of, in case of deceased locator..... 190
Effect of the, of a claim by its relocated name..... 520
Where names of locators and signers of a, differ, identity of persons must be shown..... 154
Contracts for, are sufficient to support an application if title was acquired before patent..... 163
In early days, was simply a transfer of possession..... 516
In writing is not necessary to the transfer of a mining-claim..... 523
Reference to a location certificate in a, is equivalent to a definite description..... 419
One member of a partnership may convey his interest without dissolving partnership..... 514
Effect of a certain second..... 511
Possession can only be conveyed by deed..... 489
What is excepted and included in a, of mineral land..... 510
**Co-owner.**
Proceedings in case a, fails to contribute his share of annual expenditure.....4, 32
Proceedings in case of delinquent. 32, 217
A delinquent, of a tunnel lode may be proceeded against..... 222
When, may compel other co-owners to an accounting..... 440
**Copper.**
Extent of claims of, on veins..... 2
Under act of 1866..... 19
Is found in rock in place..... 83
Veins only of gold, silver, cinnabar, and, could be patented under act of 1866.....5, 19
Lands containing, cannot be sold under the coal laws.....15, 69
Timber lands containing, not subject to sale.....27, 65
**Corner Post.**—*See Monument.*
**Corporation.**
Land-office rules as to citizenship of a..... 44
Proof of citizenship of a..... 2
When, is deemed a citizen..... 371
Declaratory statement and proof by a, in coal applications..... 338

PAGE.

No act passed at the first session of the 38th Congress shall be construed as granting mineral land to a..... 13
May secure patent for lode-claim. 37
May enter placer-claims..... 9
Adverse claim of, how sworn to... 144
Cannot be bound by an unauthorized contract by its board of directors..... 492
Such a contract is void..... 492
An overdraft in usual course of business is an indebtedness for which a, is responsible..... 492
A foreign, cannot assert an adverse claim to unpatented ground..... 80
In whom the title conveyed to a, is vested..... 497

**Corporation Articles.**
Form of..... 543

**Corporation Seal.**
A deed, without the, is inadmissible except when..... 494

**Co-tenant.**—*See Tenant in Common.*
Expenditure in the interest of one, is impossible..... 498
When all but one, withdraw an adverse claim, the court must decide..... 92

**County Surveyors.**
Subdivision of sections may be made by..... 8
May subdivide sections..... 16

**Courses.**
And distances give way when in conflict with fixed objects..... 194

**Court.**—*See Suit.*
Jurisdiction of State and Federal, in mining contests..... 500
Decisions of, cannot be supervised by the General Land Office..... 75
Adverse claimant must commence proceedings in, within thirty days after filing adverse claim.. 6
Must pass upon an adverse claim. 6
Proceedings to be commenced in, must be commenced by the adverse claimant..... 40
What the, findings must show where title is based on possession..... 518
Local district laws should be proved before the..... 501
Where all but one co-tenant withdrew an adverse claim the, must decide..... 92
Decision of, is binding, and the defeated mining claimant cannot assert the agricultural character of the tract..... 187

**Crevice.**—*See Lode.*

PAGE.

Discovery of mineral-bearing, necessary for a location..... 34

**Cross-Lode.**—*See Lode.*
Rights in case of..... 10

**Cultivation.**
Lands not fit for, but good for timber, for sale in California, Oregon, Nevada, and Washington Territory..... 26, 65

**Custom.**—*See Local Laws.*
Digest of court decisions respecting..... 497
Where the terms of a contract are doubtful, must be looked to.... 493

**Dakota.**
Black Hills and other mines in, located in the Indian country prior to Feb. 28, 1878, should be re-located..... 212
Timber cutting in, authorized by act of June 3, 1878..... 26
Residents of, may cut timber..... 26
Saline law of 1877 does not apply to..... 68

**Damages.**
By tailings must be paid for..... 522

**Date.**
Of location, how determined..... 122
From what, a lien attaches..... 500

**Declaration.**—*See Alien, Foreigner.*

**Declaratory Statement.**
For coal lands, how and when filed..... 14, 69
Form of, in coal applications by corporations..... 338
Form of, in coal land cases..... 72
How and when filed in coal land cases..... 14, 72
Required under coal laws of 1865. 30
Only one, for coal lands is allowed..... 343
More than one coal, may be filed by one party..... 343
The original, in coal cases must be fowarded to the General Land Office..... 341
To be filed with an application for timber or stone lands..... 27

**Deed.**—*See Conveyance.*
Is immaterial when possession is alone sufficient to maintain title. 516
Entry on land under show of tftle is good against no better title... 518
Constructive possession under a, is to what extent..... 517

**Defenses.**
How, must be set up in answer in Nevada courts..... 444

**Definitions of the following Terms:**
Actual mining-claim..... 87
Apex or top of vein..... 505
Face of tunnel..... 35

PAGE.
Fahlbands..... 52
Floors..... 52
Forfeiture..... 499
Lands valuable for minerals..... 324
Lead..... 52
Ledge..... 52
Legislative compact and ordinary law..... 101
Line of tunnel..... 35
Location..... 424
Location in White Pine Co., Nevada..... 507
Lode.....52, 88, 352, 370, 382, 400, 452, 453, 508
Mining-claim..... 511
Mining ground..... 512
Mine..... 509
Mineral lands..... 511
Minerals.....309, 509
Placer-claims.....7, 515
Quarry..... 509
Rock in place.....50, 82
Stockwerke..... 52
Top or apex..... 505
Valuable mineral deposits.....50, 88
Timber, in railroad act of July 1, 1862..... 523
A vein or lode in the Eureka case. 352
Vein or lode.....52, 88, 370, 382, 400, 452, 453, 508
Work on a claim..... 526
Delinquent Co-owner.—*See Co-owner.*
Deposit.—*See Mineral Deposit.*
A place for, of tailings may be secured..... 522
Depth.
A lode may be followed to any.... 508
Deputy.
No person can act as, for the register..... 187
Deputy Mineral Surveyors.
Circular of November 13, 1877, relative to..... 61
How appointed..... 45
Instructions as to appointment of 61
Instructions to, by Commissioner as Surveyor-General..... 161
To be appointed by the Surveyor-General..... 9
Applicant for patent may employ any..... 45
Applicant is responsible to, for expenses of survey..... 308
Cannot act as attorneys for claimants..... 63
List of, and subsequent appointments of, should be sent to the General Land Office..... 63
Errors in field-notes must be corrected by..... 234
Is not authorized to survey outside his district..... 88
Must make survey of adverse claims..... 40
Description.
Digest of court decisions relative to..... 497
Of vein claims on surveyed and unsurveyed lands..... 6
The legal record should give an accurate, of claims..... 519
Of the claim may be appended to the record of a location..... 506
A patent is recalled when an error in, or name is found..... 87
A certain Colorado location certificate is void for uncertainty of.. 504
Diagram.
Required to be posted on claim applied for under act of 1866...5, 18
Diamonds.
Lands producing, are subject to the mining laws..... 88
Digest.
Of court decisions..... 488
Diligence.
Adverse claim must be prosecuted with diligence.....6, 40
On the part of an adverse claimant is a question for the courts to decide..... 243
A question of, where an adverse claimant failed to bring himself within the jurisdiction of the court..... 279
Must be used to secure tunnel rights..... 3
Required of tunnel owners in working same..... 36
Dip.
Vein may be followed on its...2, 5, 19
A locator may follow his vein on its, when..... 347
A lode may be followed on its, to what extent..... 352
An agreed dividing line, how followed on the..... 352
Discoverer.
An extra claim allowed the, under act of 1866.....2, 19
Under act of 1866 was entitled to 200 feet extra..... 146
Discovery.—*See Location—Discovery Stake.*
Digest of court decisions affecting..... 498
The locator of an abandoned mine by an outfitted partner is treated as a discoverer..... 520
A junior location cannot extend over a senior, when..... 504
Discovery Shaft.
When, marks middle of vein..... 33
Post or stake to mark..... 34

PAGE.
A reasonable time is allowed to sink a..... 503
What notice should be placed at... 34
Must be sunk ten feet under Colorado laws..... 410
When, determines middle of vein. 33
**Discovery Stake.**
Erection of, is sufficient possession when..... 394
**District.**—*See Land District.*
The boundaries of a, may be changed..... 498
It is not essential to the proper holding of claims that a, should be organized..... 524
Proceedings when a claim is not within an organized..... 90
Deputy mineral surveyors cannot survey beyond a..... 88
At least one surveyor should be appointed for each mining..... 45
The President may establish additional land..... 12
**District Laws.**—*See Local Laws*
Effect of re-locations under new... 82
Govern locations, when..... 82
**District Recorder.**—*See Recorder.*
When, should issue certificate of location..... 34
Must attest copies of his records.. 38
**Divided Interest.**
Proceedings to secure patent in case of undivided and..... 92
**Ditch.**
Act concerning, and canals of July 26, 1866..... 19
Right of way for, is granted..... 11
Right of way for, how secured.... 520
A contest between a hydraulic miner and the owner of a..... 472
Form of notice for..... 539
**Donation Claims**
In Oregon may embrace coal lands..... 339
**Drainage.**
Laws for, may be provided by State or territorial legislatures.. 11
May be provided for by local legislature..... 79
**Dump.**
Lands of little agricultural value may be reserved and sold for mining purposes..... 186
**Easement.**
May be provided for by local legisture.....11, 79
**Ejectment.**
For entire claim, may be had where claimant has color of title..... 419
Plaintiff in, with proper title, must prove what..... 507

PAGE.
When a partner may sue in assumpsit or for..... 520
An administrator can maintain, for claims..... 524
**Eminent Domain.**
Mines on the public lands belong to the..... 454
**End Lines.**
Of lode claims, must be parallel...2, 3, 31, 33, 62, 194, 522
Must be parallel. Circular of September 13, 1878..... 62
Limit the extent of a vein on its downward strike..... 3
Bound vein limits outside of side lines..... 3
Veins cannot be followed beyond. 31
How made parallel in overlapping or triangular claims..... 236
Presumption as to non-parallel, in a patent..... 352
The requirement of parallelism in, is merely directory..... 352
Were implied in the act of 1866... 352
When, become side lines..... 347
Of a certain survey considered... 304
Because, of a lode claim are not parallel does not affect the validity of a patent..... 370
**Equitable Confirmation, Board of.**
An irregular application may be submitted to the.....4, 198
**Equity, Court of.**
May protect a tunnel right..... 526
A proceeding in, cannot restrain the prosecution of an application for patent..... 158
A certain adverse claimant's remedy is in a..... 212
**Error.**
A patent is recalled when an, in description or name is found.... 87
Proceedings when, is found in a patent..... 175
Proceedings when an, is found in surveys..... 100
**Escrow Agreement.**
Form of..... 541
**Estoppel.**
Is not an element of abandonment..... 488
What declaration may act as an... 506
**Evidence.**—*See Affidavit—Proof—Testimony.*
Penalty for falsely presenting, in California..... 17
Required of applicant for patent.37,38
What, is needed to establish title to placer-claim..... 8
What, should be presented by placer applicant..... 43
What is, of prior location..... 410

PAGE.
Satisfactory, of the agricultural character of land..... 87
What may be, to disprove abandonment..... 488
Certain, intended to disprove abandonment..... 490
Possession is *prima facie*, of title. 516
What may be, of title..... 524
What is satisfactory, of possession..... 518
A bill of sale is; what is, of a bill of sale..... 520
When a new book of record is admitted as ..... ..... 519
That a portion is not valuable for mining purposes does not affect mining rights thereon ..... 518
Of possession of placer-claims, sufficient when..... 8
When parol, may explain a description .... ..... ..... 497
When declarations as to boundary are not admissible..... 492
In connection with a conveyance.. 494
Contents of a deed, how proved.. 496
Of existence of certain local mining rules and customs..... 502
Parol, is admissible in a suit, when 413
Of title, may be the records of a mining district..... 414
Question as to general belief as to abandonment, ruled out..... 505
**Excepting Clause.**
In townsite patents in mining regions.....101, 188, 263
In patents for mining-claims within townsites..... 183
In patent for the Seven-Thirty Lode, Colorado..... 140
In a certain patent where locations cross to prevent prejudice in a possible future contest..... ..... 245
In placer patent..... 176
In agricultural patent..... 176
No, should be inserted in a placer patent where the placer was located prior to the use of the land for town purposes..... 282
When townsite, should not be inserted in patent for lode claim.. 328
**Execution.**
The interest of a miner is property and liable to..... 498
A mining-claim is subject to..... 511
The rule of *caveat emptor* applies to sales under..... 512
**Executor.**
What is required in case of transfer by an, of a deceased party's estate..... ..... 190
**Exemplification.**
Of patents and papers furnished interested parties only ..... 83
**Expenditure.**
Digest of court decisions relating to..... 498
Amount of, governed by local laws, how far..... .....
Made prior to re-location cannot be claimed by re-locator though one several original owners..... . 300
On re-located mines, by whom made..... ..... 161
A certain Colorado law relative to discovery shaft is not repealed by the act of Congress of Jan. 22, 1880..... 290
In running a tunnel, act of Feb. 11, 1875..... ..... 24
There is no specified amount of, required on a tunnel location... 121
Effect of, of $5,000 on coal lands before entry.....14, 69
How, affects coal land entry..... 13
**Expenditure, Annual.**
Form for proof of..... 527
When and how made..... 35
Act of March 1, 1873, relative to.. 23
Act of June 6, 1874, relative to... 23
Circular of March 18, 1873, extending time to June 10, 1874,. 64
Circular of June 9, 1874, extending time to Jan. 1, 1875..... 65
Circular of March 5, 1875, tunnel amendment..... 65
Instructions under act of Jan. 22, 1880..... ..... 65
Annual, on vein or lode claims.... 4
On lode claims located prior to May 10, 1872..... 32
May be made from the surface or by tunnels..... 35
May be made by an agent..... 491
On lodes located prior to May 10, 1872 ..... ..... 32
Proceedings where co-owners refuse to share..... 32
To what extent is governed by local laws..... 24
A re-location of abandoned ground can only be made at the expiration of year next succeeding the one for which the last, was made 255
Failure to pay, or work a claim, indicates abandonment.....488, 489
Forfeiture claimed under an agreement involving..... 499
Local law may prescribe a larger, than is required by Congress.... 291
Act of Jan. 22, 1880, relative to... 24
Construction of the act of Jan. 22, 1880, as to..... 275
A certain question of, in Colorado, under the act of 1880, decided. 295

PAGE.

Is necessary to date of payment and entry; a pending suit will not excuse..... 255
A large expenditure in the past does not excuse the..... 222
A party who contributes his share of the required, can retain his interest. The Land Department offers no remedy where a party fails to contribute his share of the actual expenditure..... 222
Work necessary to hold a claim. 371, 383
Work necessary to hold adjoining claims..... 382
When a discoverer is prevented from making, by adverse claimant, affect..... 394
United States laws do not require, on placer-claims .... ..... 133
A placer-claim is subject to re-location if local laws which require, are not complied with.... 312
Must be made at no particular part of the year..... 402
Classes of testimony for proving value of..... 421
Certain claims near Comstock lode are not affected by U. S. laws as to..... 302

**Expenditure of Five Hundred Dollars.**
Certificate of Surveyor-General as to, on claim by claimant or grantor ..... 5
Certificate of Surveyor-General as to..... 38
Surveyor-General's evidence as to. 62
Form of affidavit of..... 553
How shown, in the four classes of mining-claims..... 132
The Surveyor-General does not make a separate certificate as to, it is endorsed on plat and field-notes..... ..... 209
If the Surveyor-General is not satisfied as to the, he may call for more proof..... . ..... 221
A hearing may be had to determine if the, has been made..... 218
Actual, by the owner of a mine must be shown..... 259
Roads and necessary work may be included in..... ..... 298
In running a tunnel, is credited on the lode or lodes developed.. 259
May be made in a tunnel partly owned by the claimant..... 218
In estimating the, improvements made by owners who abandoned cannot be included..... 241
How made on placer-claims..... 145
Separate claimants in a placer-mine may unite their means and make the, at one point, and secure patent..... 180
How shown in placer applications.....
Is not required where placer applicant bases his right to patent on the statute of limitations..... 312

**Exploration.**
Mineral lands are open to..... 1

**Expenses.**
In hearings, how paid.....46, 53
Of surveys, subdivisions of sections, and publication of notice shall be paid by the claimant.... 9

**Face of Tunnel.**
Definition of..... 35
The line of a tunnel may extend three thousand feet from the.... 3

**Fahlband.**
Definition of..... 52

**Fees.**
What may be charged by local officers in land cases..... 15
What, are chargeable by local officers in mining cases..... 46
Statement of, to be filed with local officers.....10, 39, 46
For taking testimony at hearings to determine character of land.. 50
Are not required for filing protest, including adverse claims improperly presented ..... 272
No, are charged for second filing of adverse claim in case of republication of notice..... 272
Statement of, and charges..... 533
An adverse claim will not be filed until the, are paid..... 191
Required under timber and stone law..... ..... .....28, 66

**Fences.**
Are not required to mark boundaries..... 493

**Field-Notes.**—*See Survey—Plat.*
To be filed with an application for patent.....4, 5, 37
Surveyor-General's certificate to be endorsed on..... 38
Certificate to be attached to, of mining-claims.....60, 61
Required expenditures, must be shown on..... 132
Errors in, must be corrected by deputy surveyor..... 234
Monuments and, which control... 504

**Field Work.**
Land-office rules as to, for surveys..... .....37, 45

**Fire Clay.**
May be patented..... 121

**Float.**

PAGE.
The California school grant is in the nature of a..... 101
Floors.
Definition of..... 52
Florida.
Saline act of 1877 does not apply to..... 68
Flumes.—*See Ditch.*
Right of way for, how secured. 438, 520
Foreign Corporation.
Rights of a, under a patent..... 177
Foreigner.—*See Alien—Citizen.*
A, may make and dispose of a location providing he becomes a citizen before disposing of the same ..... ..... 154
Forfeiture.
Digest of court decisions relating to..... 499
Of tunnel location, how made..... 86
How interest of a tenant in common is secured..... 523
When a tunnel location is abandoned there is a, of all undiscovered lodes..... 222
Under named circumstances, could be prevented how..... 505
Forms.
1. Notice of location..... 527
2. Proof of labor..... 527
3. Notice of forfeiture..... 528
4. Of affidavit of failure to contribute..... .. ..... 528
5. Miner's lien..... 528
6. Application for survey..... 529
7. Application for patent..... 529
8. Posting notice and diagram on claim..... ..... 530
9. Plat and notice posted during publication..... 531
10. Register's certificate of posting..... ..... 531
11. Notice of publication in newspapers..... 532
12. Agreement of publisher..... 532
13. Proof of publication..... 532
14. Affidavit of $500 improvements..... .... 533
15. Statements of fees and charges 533
16. Proof in absence of records... 533
17. Affidavit of citizenship ..... 534
18. Certificate that no suit is pending..... 534
19. Power of attorney to apply for patent..... 534
20. No veins in placer-claim..... 535
21. Adverse claim..... ..... 535
22. Tunnel claim—location certificate..... 538
23. Power of attorney to locate and sell..... 538
24. Notice of right to water..... 538
25. Pre-emption of right of way for water..... 539
26. Mining deed..... 539
27. Title bond to mining property. 540
28. Escrow agreement..... 541
29. Mining lease..... 541
30. Incorporation and by-laws.... 543
31. Stock certificate..... 547
32. Sketch of minutes of first meeting..... 548
Excepting clause in agricultural patents protecting water rights. 176
Excepting clause in placer patents ..... 176
Habendum clause in a patent where there is a probability of future contest..... 248
Of certificate of Surveyor-General on plat and field notes of survey. 60, 61
Of excepting clause in Seven-Thirty lode patent, Colorado.... 140
Excepting clause in townsite patents relative to mining-claims... 183
Excepting clause in mining patents within townsites..... 183
Of clause in patent for easement and drainage..... 79
Sworn statement under timber and stone act of 1878..... 66
Testimony under ditto..... 66
Blank, for mineral proof are not furnished by the General Land Office ..... ..... 50
Of affidavits and proof in coal land entries..... .....71, 72, 73
Coal declaratory statements by corporations..... ..... 338
Of clause inserted in patent for claims on or near the Comstock Lode..... 98
No precise, is required in a mining bill of sale..... 494
Fraud.—*See Statute of Frauds.*
In the absence of, the application by one joint owner is the application of all, and the legitimate acts of attorneys are the acts of the claimants..... 202
In leasing a mine..... 500
Who may attack a patent in case of..... ..... 515
How far the rule of *caveat emptor* applies ..... ..... 511
General Land Office.—*See Commissioner.*
The general records of the, may be examined in connection with an application for patent..... 137
Cannot notice an action in equity to restrain further prosecution of application for patent..... 158

PAGE.

**Gift.**
Because a bill of sale is a, is no objection to its admission in evidence..... 521
**Glossary**..... 548
**Gold.**
Extent of claims of, on veins. ..... 2
Lands containing, cannot be sold under the coal law.....15, 69
Timber lands containing, not subject to sale..... 27, 65
Veins of, silver, cinnabar, and copper only could be patented under act of 1866..... .....5, 19
Particles of, in a tract do not constitute it mineral land..... 510
**Grants.**
What, shall not include mineral lands..... ..... ..... 13
**Gypsum.**
Is a mineral..... 309
**Hearing.**—*See Contest.*
Land-office rules as to, to determine character of land.....46, 53, 57
Any person may appear at, to sustain the mineral return..... 183
How notice in, should be prepared and testimony taken..... 176
May be had to ascertain necessary facts to base a decision upon.... 224
May be had to determine amount of expenditure..... 218
Witnesses cannot be compelled to be present at, claimants may testify on their own behalf at.. 74
When, may be ordered to investigate adverse claims..... .. 318
Where a mill-site is within a placer location, a, may be had to determine improvements, character of land, etc..... ..... 222
A, may be had to determine the facts where a townsite is alleged to contain coal lands..... 339
May be had to determine facts in connection with Sutro Tunnel. 197
In contested coal claims..... 70
When, is had under timber and stone law of 1878..... 66
May be had to show saline character of land..... 68
**Heirs.**
Have same right as locators..... . 3, 4
Title of, in a certain California case..... 495
**Highway.**
Rights for, under act of 1866..... 20
A public, cannot be an adverse claim..... ..... 83
Compensation should be given for a, over mines, etc..... 520
**Hoisting Works.**
When, are not the property of a mining claimant ..... 499
**Homestead Claim.**—*See Agricultural Land.*
When recognized in mineral regions..... .....8, 12
On agricultural land is not defeated by placer-claim ..... 7
Every, is subject to water rights. 11
**Homestead Claimant.**
May enter agricultural land less than 40 acres left by mineral survey..... 8
**Homestead Entry.**
Coal lands cannot be embraced in a..... 339
Non-mineral lands, open to..... 12
What lands unfit for, are subject to entry under timber law..... . 65
**Idaho.**
Local officers in, receive extra fees..... 16
Citizens of, may cut timber..... 26
**Improvements.**—*See Expenditure.*
Only, made by the applicant or his grantors should be taken into consideration by the surveyor... 60
The Surveyor-General derives his knowledge of the, on a claim from his deputy.... ..... .. 62
Certificate of, how made when placer-claim embraces legal subdivision.. ..... ..... 124
**Incorporation.**—*See Corporation.*
Certificate of, must be filed with applications by incorporated companies..... 122
**Indian Reservation.**—*See Reservation.*
**Indian Territory.**
Minerals in the, are reserved..... 119
**Indians.**
A party driven away by, does not abandon ..... 488
Only Black Hills locations made after cession by, are valid..... 492
**Injunction.**
When an, may be granted..... 499
**Instructions.**—*For List of Circulars see Table of Contents.*
**Intention.**
Enters into the question of abandonment.. ..... 488
The question of, is not involved in forfeiture..... 499
**Intersecting Lodes.**—*See Lode.*
Rights in case of..... ..... 10
**Intimidation.**
Where discoverer is prevented by, from doing necessary work, effect of..... 39
**Iron Claims.**
May be patented.....124, 134

PAGE.
Location of, how regulated..... 124
Joint Entry.
Parties owning contiguous placer tracts may secure patent by..... 7
Cannot be made of placer tracts at wide distances apart or in separate districts..... 78
Joint Location.
May be made by an association... 33
Joint Owner.
When an application by one, is the application of all..... 202
Judgment.
A common law, may be given for surface and the right to follow the lode..... 508
Proceedings where, shows that neither party has title..... 25
Judgment Roll.
Copy of, to be filed with the Register of the land office, when.... 6
A copy of a certain, may tend to disprove abandonment..... 488
Jurat.—*See Adverse Claim.*
To the adverse claim, how made.. 124
Jurisdiction.
Consent cannot give..... 163
Of State and Federal courts in mining contests..... 500
The courts have, over the question of diligence on the part of an adverse claimant..... 248
The, of the Land Department and the courts in applications considered..... 199
Of local officers over adverse claims..... 98
Where an officer's, extends within a land district, he may administer oaths outside the district in applications for patent..... 208
Jury.
A certain question of abandonment was properly left to the... 489
The verdict of a certain, has special weight in the question of abandonment.....490, 524
Kaoline.—*See Clay.*
May be patented as a mineral..... 176
Kansas.
Mineral lands in, excepted from mining laws..... 24
Labor.—*See Expenditure.*
Land Adjoining.
To be sold subject to miner's right to follow vein on its dips, angles, and variations..... 5
Land District.
The President may establish additional..... 12
Any officer having jurisdiction within a, may hear testimony in contests, etc..... 10
Adverse claim rejected because not sworn to within the..... 97
Patent proceedings where a claim is in more than one..... 181
Where an officer's jurisdiction extends into a, he may administer oaths outside such, in applications for patent..... 208
Newspaper in a, when designated for all publications..... 10
Affidavit how verified in a..... 10
When affidavit of citizenship must be sworn to within..... 267
Land Office.
Papers filed in the, cannot be removed therefrom..... 98
Land Officer.—*See Register—Receiver.*
Laws.—*See Act of Congress.*
Part I..... 1
Distinction between an ordinary and a legislative compact..... 101
Lead.—*See Lode.*
Definition of..... 52
Extent of claims of, on veins..... 2
Lead.
Deposits of, may be patented..... 2
Leadville.
Consideration of a patent for placer claims in..... 424
Lease.
Public mineral lands cannot be leased..... 79
Entry on land under a, is good against no better title..... 518
Consideration of a fraudulent..... 500
Where party under a, is liable for royalty..... 500
Ledge.
Definition of..... 52
How the term, in a deed, is to be construed..... 497
Legal Subdivision.
A ten-acre tract is a, in the mining regions.....7, 41
When placer-claims, are located and sold by.....7, 41
Who makes certificate of improvements when placer claims embrace..... 124
A quartz claim cannot be bought by..... 189
Mineral lands in certain States are sold by.....23, 24
Placer claims on, need not be surveyed..... 8
Coal entries must be by.....13, 69
Timber and stone lands are purchased by..... 27

PAGE.

**Legislative Compact.**
Distinction between an ordinary law and a..... 101
**Legislature.**
The local, may provide for easement and drainage of mines.... 79
District laws recognized by the courts have the effect of laws passed by a..... 501
Of any State or Territory may provide rules for developing mining claims..... 11
**Length.**—*See Location.*
Of claims on veins or lodes, how governed.....2, 33
Of claims under Act of 1866.....2, 20
**Letters.**
Sent to local officers are government property..... 99
**Liens.**
Digest of court decisions relating to..... 500
Is not impaired by mining laws.. 9
Are strengthened by patent..... 82
For what a lien may be secured on a mine in Utah..... 438
May be had for building a shop... 500
From what time a, attaches..... 500
Form of miner's..... 528
**Limestone.**
May be patented under the mining laws..... 176
Is a mineral within the meaning of the mining acts..... 309
**Lime Works.**
When, are not a mine..... 509
**Line of Tunnel.**
What is prospecting on forbidden..... 35
**Local Office.**—*See Land Office—Register.*
Letters and record of letters in the, are government property..... 99
**Local Laws.**
Origin of mineral laws and customs stated..... 472
Digest of court decisions relative to..... 500
Govern locations made prior to July 26, 1866..... 249
Miners may make, subject to certain requirements..... 3
Mineral deposits to be occupied and purchased according to, not in conflict with the United States laws..... 2
Limit of width of vein or lode claims by..... 2
Claims located prior to May 10, 1872, are governed by, and United States laws in force at date of location..... 2

PAGE.

Govern width of surface within certain limits..... 33
Govern manner of recording, amount of work, etc..... 34
Claim to be improved according to.....5, 19
Diagram under Act of 1866, to conform to.....5, 19
Power of miners to limit lode claims..... 370
Must be in force—a question of fact.....370, 381
Record of claim is only necessary when, require it.....371, 382
Length and width of lode-claims, how affected by..... 381
Must not conflict with United States laws..... 381
As to ditch and staking of claim must be complied with..... 504
Locations that do not conform to the, are void..... 283
Because the majority in a district disregard the, is not evidence that they have become a dead letter..... 283
Possession as regulated by..... 516
Extent of possession in absence of. 517
Constructive possession may be shown how..... 517
Limit the extent of ground in a location..... 506
Construction of, as to extent of surface..... 507
Are not the best evidence of the priority or extent of a party's actual possession..... 413
Application should show compliance with..... 199
In the absence of allegations to the contrary, a locator is presumed to have complied with the, before recording his claim..... 209
Adverse claimants need not show affirmatively that they have complied with the..... 128
*Prima facie* evidence that a ledge was discovered in a location as required by the..... 211
A record is kept only when prescribed by the..... 519
Where bounds are marked, possession of part gives possession of whole, though location be contrary to the..... 516
May grant right of way of mines, etc..... 520
When failure to comply with, is abandonment..... 490
Effect of, on forfeiture..... 499
Govern the number of lodes one person can own..... 90

PAGE.
The statute of limitation forms part of the, governing claims... 445
The Act of Congress of January 22, 1880, does not repeal the, relative to expenditures, work, etc., not in conflict therewith... 290
May prescribe larger expenditures than the laws of Congress..... 291
Effect of, on annual expenditure under the Act of 1880..... 295
A certain Colorado law relative to expenditure is not repealed by the Congressional Act of Jan. 22, 1880..... 290
Where district laws are repugnant to territorial laws, authority therefor must be shown..... 78
Of Eureka Mining District, Nevada, considered..... 361
Width of locations under Montana law of 1864..... 194
Construction of certain, as to two days' work..... 526
When a location dated after July 26, 1866, was properly made under the..... 140
Cannot restrict placer-claims to less than 20 acres..... 42
Alone govern annual expenditure on placer-claims..... 133
A placer-claim is subject to relocation if, which require annual expenditure are not complied with 312
Water rights acknowledged by, are protected..... 11
Proof required in absence of district laws..... 115
Need not be adopted to properly hold mining claims..... 524

Local Rules.—*See Local Laws.*

Location.—*See Mining Claim.*

Digest of court decisions affecting 503
Definition of..... 424
What is included in a, on a vein or lode..... 3, 33
The requirements of a valid, on veins or lodes.....3, 4
Of claims on veins or lodes, how governed..... 2
Miners' laws govern, how far.....2, 3, 18, 34
Is governed by district laws, when. 82
Must be distinctly marked..... 34
Must contain what..... 34
Surface of another, cannot be entered upon..... 31
A failure to make and record a, according to law, will defeat the claim.....58, 59
Local law requirements must be strictly complied with ..... 501
Every, which does not conform to the district laws is invalid..... 283
Where a, is illegal and void, the subsequent proceedings, even if in due form, are invalid..... 285
How to be marked.....371, 382
Right of, subsequent locator to object.....371, 382
The difference between a, under acts of 1866 and 1872..... 512
Notice of, should contain what.... 515
Erection of discovery stake is sufficient possession, when..... 394
Is invalid when not properly marked ..... 60
Survey must show lines of original.....58, 330
Must be properly marked or survey must be declined..... 330
The official survey must be made subsequent to..... 62
A survey should be made according to the, and only the applicant can appeal from the approval or disapproval of a survey... 300
Survey of a mine before, cannot be the official survey..... 248
The survey of a, not made in accordance with the district laws should be refused..... 302
Effect of obliteration of marks.... 382
What are prerequisites to ..... 410
What notice of, will protect a claim..... 395
Must be distinctly marked upon the ground..... 259
Every, under the act of 1872 must be accurately described..... 146
What must be shown in the record of a..... 371
The record of a, must contain a description that will identify the claim..... 259
Prior, takes ore at point of intersection and the union of two locations ..... 10
Right of way of subsequent, through intersection..... 10
Only one vein can be the basis of a..... 276
Must be made lengthwise on a vein..... 277
A, should be made along the course of the vein..... 347
Effect of making a, across the lode. 347
The form of a lode must be substantially a parallelogram..... 276
*Prima facie* evidence that a ledge was discovered as required by the local laws..... 211
Cannot be made until discovery of a vein or lode..... 2

PAGE.
A valid, creates vested rights..... 511
Discovery of vein after, effect of... 371
Discovery of mineral after, effect of..... 511
Validity of, is not in question, when..... 523
Date of, how determined..... ..... 123
The, privilege is in the nature of a pre-emption. ..... ..... .. 444
Adoption of local laws after..... 502
Conveyance of a lode owned under more than one..... 495
Senior patent on a junior..... 514
How the doctrine of relation affects a patent in case of an earlier..... ..... 352
With names of other parties than in the original..... ..... 520
Where one, crosses another, the patents issued should not prejudice a future contest..... .. 245
Identity of claim applied for with the tract embraced in the, must be shown..... ..... ..... 249
Parol evidence may define the tract embraced in a..... 163
What the, of a lode-claim carries with it..... 400
When junior, has apex, senior on dip will hold..... ..... 410
What is evidence of prior..... ..... 410
Made prior to May 10, 1872, rights under..... ..... ..... 515
Expenditure is reckoned on the calendar year succeeding the year during which, is made..... 65
When a trespasser cannot allege defect in an adverse..... 395
What possession is required before discovery of mineral..... 399
A trespasser can acquire no rights by a..... ..... . 526
On line of tunnel invalid, when..3, 35
Cannot be made in behalf of Miners' Poor Fund..... 80
In Arizona, how made—subject considered..... 119
Under Colorado act of February 9, 1866, recorded after July 26, 1866..... ..... ..... 140
In Montana is valid only after one wall is found..... 498
In New Mexico, how made..... 76
A certain, in Ophir District, Utah, is not void for uncertainty..... 158
Miners contesting agriculturists may be confined to original..... 100
Within a military reservation cannot be sustained..... 259
Of mill site, how made..... 43
Of iron claims, how regulated.... 124
Rights of a discoverer in a..... 498

PAGE.
Of a vein more than fifteen hundred feet long..... 117
The surface grounds within the lines of a, is exclusively the property of the locator..... 178
May be made by an agent ..... 491
Made in the name of a principal, cannot be claimed by an agent. 491
By an alien, also by an alien and citizen..... ..... 371
A foreigner may make and dispose of a, provided he became a citizen before disposing of it..... 154
Application rejected because, was not legally made..... ..... 119
Literal boundaries were not always given in the early..... 497
Consideration of a, alleged to be void for uncertainty..... 194
Under act of 1866, how made..... 219
Only one, can be made on one vein under act of 1866..... 2
The, of claims prior to July 26, 1866, is governed by the local laws in force at the time..... 249
Extent of placer..... 42
Of placer-claims, how regulated... 145
Of a placer-claim may be made jointly..... 515
Location Certificate.
When issued by recorder of district..... ..... 34
Reference to, in a conveyance is equivalent to a definite description..... ..... ..... 419
Defective, may be amended, when 410
Conflicting evidence as to original location..... ..... 410
Location Notice.—*See Notice.*
Form of..... ..... 527
Proceedings where names were inserted in the, without owner's consent..... 219
Where names in the, and a conveyance differ, identity of persons must be shown..... 154
A copy of the, should accompany the request for a survey, an irregularity in filing considered... 221
Copies of conveyances or an abstract of title and copy of, should be filed with an adverse claim..... 123
Consideration of a somewhat indefinite..... ..... 199
Changes in a certain, did not show abandonment..... ..... 488
The Prince of Wales claim is not void for uncertainty..... 163
Should not be held to technical accuracy..... 163
Of lode-claim, should contain what 34

PAGE.
When, may be filed in case of conflicting surveys..... 68
Is not required where a tunnel is run for the purpose only of developing known veins..... 301
Locator.
Need not be first discoverer..... 382
Distinction between purchaser and..... 419
Purchaser of a claim may occupy different position from..... 419
Change of name of, on notice..... 513
The rights of a.....3, 492
A woman may be a..... 221
In the absence of allegations to the contrary, a, is presumed to have complied with the local laws..... 209
First, of mines cannot freely damage property by their tailings... 522
A senior, waves his priority by failure to adverse a junior locator's application..... 352
Only 200 feet could be taken by each, under the act of 1866 unless he were discoverer..... 146
Proof of transfer of title in case of deceased..... 190
Lode.—*See Vein.*
Definition of a.....52, 352, 370, 400, 452, 453, 508, 509
How located, after May 10, 1872..18, 33
Distinction between a, and placer. 515
The mining law contemplates every form of..... 82
A, may be followed on its dip, to what extent..... 352
Comparison of the acts of 1866 and 1872 as to..... 352
Length and width of claims on veins or.....2, 18
When a, is in place..... 453
When a, is such within the law... 453, 454
When ore is not in a, within the law .....453, 454
Rights where one, intersects another ..... 10
How far a, may be followed..... 505
A location of a lode-claim requires a piece of land and the ..... 506
Oldest location takes, at and below union..... 10
Any, within location belongs to claimant, to what extent..... 505
Top or apex of, defined..... 505
Where apex is in junior location, effect on senior location..... 410
Cannot be followed beyond end lines..... 31
How followed under locations made prior to May 10, 1872..... 515
PAGE.
Surface ground and, are not independent grants..... 522
Is the principal object sought in a claim..... 522
The location must be on one vein and, but one, can be the basis of a location..... 276
Existence of, in a claim is a question of fact..... 400
Discovery of, is necessary to secure rights.....370, 382
Discovery of, after location, effect of.....370, 382
Right to other veins than those discovered.....371, 382
Work necessary to hold a claim.. 371, 383
To claim a full location a, must be shown..... 511
Effect of discovery of, after location..... 370
Changing course of, after location. 512
When the, leaves the side lines of a patented claim..... 514
Cannot be followed beyond side lines..... 514
Where surface rights do not conflict, the possibility of a future union of one, with another should not delay patent..... 93
Opened at different points, may furnish a question of actual and constructive possession..... 516
Location of a, more than fifteen hundred feet long..... 117
What is the middle point of a..... 231
The middle of a, must be ascertained by actual development.. 276
Patents for, issued prior to May 10, 1872, how enlarged. ..... 32
Land-office rules as to a, in a placer-claim..... 41
A placer-claim and non-contiguous, cannot be embraced in one application..... 236
When a lode discovered within a placer-claim does not affect application for placer patent..... 312
A, benefited by a tunnel owned by the lode claimant, received credit for the tunnel expenditure 259
Proceedings when a, is discovered in a tunnel..... 251
Law of July 26, 1866, relative to, and water rights..... 18
Only one, could be patented with an application under act of 1866. 5, 19
Lode Claim.
Locator's rights in a..... 3
Description of, how made on surveyed and on unsurveyed land.. 6
Length and width of, how regulated 381

PAGE.
Void as to excess of width allowed by law..... 381
Work necessary to hold adjoining claims..... 383
Must not be recorded until when.. 34
Should have monument at each corner..... 34
Status of, located prior to May 10, 1872.....31, 32
End lines of, must be parallel..... 62
Because end lines of a, are not parallel does not invalidate patent..... 370
Application for patent for, how made.....37, 38
When application for patent for uncontested portion of a, may proceed..... 84
Several, cannot be embraced in one application except for placer-claims..... 177
How paid for..... 39
Cannot be bought by legal subdivisions..... 189
Payment may be made by several parties who are shown on the judgment roll to own a..... 6
What patent for a, carries with it. 400
Patent for, how obtained..... 4
Application for patent for, how presented..... 4
Width of, in Montana, located under Territorial law of 1864..... 194
Located and held prior to townsite occupancy may be patented without townsite reservation.... 328
Discovered in a tunnel, how located.....3, 35
Within placer-claim, how treated.42, 91
Within a placer-claim may be excluded from the survey of such placer..... 287
Non-mineral character of millsite abutting on, may be shown..... 298
Louisiana.
Saline act of 1877 does not apply to..... 68
Machinery.
Extracted ore and, may be removed from an abandoned mine..... 192
Mails.
An adverse claimant who trusts to the United States, for filing claim or commencing suit, must abide the consequences if delay ensues ..... 214
Manufacturing.
Water rights for, are protected... 11
Marble.
May be patented under the mining laws..... 176

PAGE.
Mexican Grants.
Minerals within unconfirmed, how treated..... 308
Mica.
Valuable deposits of, may be patented ..... 182
Michigan.
Mineral lands in, to be sold by legal subdivisions.....13, 23
Salines and minerals are not reserved in school sections in..... 521
Public surveys in California and, contrasted..... 101
Middle of the Vein.
Extent of claim on each side of...2, 33
How determined..... 33
Location of surface ground on either side of..... 33
Must be ascertained by actual development..... 276
Middle Point.
What is the, of a vein..... 231
Military Reservation.—*See Reservation.*
What mineral lands may and may not be included in a..... 310
Mill.
A case of ownership of a..... 525
Mill Site.
Non-mineral land may be embraced in a..... 11
How patented..... 11
Land Office rules relative to..... 43
Must be on non-mineral land..... 88
May be located and should be recorded..... 178
Owners of a, are entitled to the timber growing thereon ..... 178
The $500 expenditure upon a, must be shown on plat and field notes..... 132
On a section belonging to a railroad..... 90
Where a, is within a placer location, a hearing may be ordered to determine sundry facts..... 222
Non-mineral character of, abutting on a lode-claim may be shown.. 298
Mines.
Mining claims distinguished from. 468
Distinguished from quarries. ..... 509
Coal lands are excluded from pre-emption as..... 30
Lands containing, are not subject to pre-emption..... 16
Mineral.
Digest of court decisions as to what is..... 509
Definition of.....52, 309
Alum is a..... 52
Asphaltum is a..... 52
Borax is a .....52, 100

PAGE.
Carbonate of soda is a..... 52
Cement, auriferous, is a..... 83
Cinnabar is a..... 2
Coal is a..... 343
Copper is a..... 2
Fireclay is a..... 121
Gold is a..... 2
Gypsum is a..... 309
Iron is a.....124, 134
Kaolin is a..... 176
Lead is a..... 2
Limestone is a..... 309
Marble is a..... 176
Mica is a..... 182
Nitrate of soda is a..... 52
Petroleum is a..... 160
Salt is a..... 336
Slate is a..... 143
Sulphur is a..... 230
Sulphur springs are not..... 75
Tin is a..... 2
Umber is a..... 161
All, pass with a conveyance..... 495
Decision respecting, in a certain deed..... 494
Separate titles to the surface and the, may exist..... 524
Is not reserved in Michigan school sections..... 521
It is a trespass to extract, from private lands..... 525
**Mineral Deposits.**
All valuable, are free to exploration and purchase..... 1
Definition of valuable.....52, 88, 309
**Mineral Entries.**
Consecutive series of, to be continued by local officers..... 89
**Mineral Lands.**
Digest of court decisions relative to..... 510
Definition of..... 324
Are open to exploration, occupation, and purchase..... 1, 31
Are reserved from sale..... 1, 2
Open to purchase by citizens...1, 2, 18
Surveys are extended over..... 16
What grants not to include..... 13
Penalty for offenses concerning, in California..... 17
Were not granted to California by act of March 3, 1853..... 101
In the Indian Territory are reserved..... 119
Cannot be embraced in Sioux Half-Breed Scrip locations..... 187
Cannot be leased..... 79
Are only subject to location under the mining law without reference to their value for townsite purposes..... 234
Whether tracts are agricultural or, is a question of fact, irrespective of how they have hitherto been sold..... 268
When unsurveyed lands cannot be presumed..... 324
When lands are designated, burden of proof should be upon agricultural claimants..... 324
Revocation of, withdrawal of alleged..... 56
Certain States excepted from mining laws.....13, 23, 24
What may, and may not, be included in a military reservation. 310
Do not pass to the Central Pac. R.R. Co..... 144
Within unconfirmed Spanish or Mexican grants, how treated.... 308
Coal lands are..... 343
**Mineral Return.**
Where land is in the neighborhood of valuable mines, only clear and positive proof can overcome the mineral return thereof..... 274
**Mineral Rights.**
When town lots are subject to..... 16
**Miner's Lien.**—*See Lien.*
Form of..... 528
**Miner's Relief and Territorial Poor Fund.**
Locations cannot be made for the. 80
**Mining Claim.**—*See Location.*
Definition of..... 424
How designated by Surveyor-General..... 39
Must be plainly defined..... 492
Must be defined as to limits, then possession of part is possession of the whole..... 516
May include one or several locations..... 424
In an action for ejectment for undivided interest what is not in question..... 523
Actual possession is not necessary to protect a valid..... 402
Digest of court decisions relating to..... 511
Is recognized as legal estates of freehold..... 524
Extent to which, is treated as real estate..... 419
Effect on title to, of a bond; rights under, &c..... 492
Definition of an actual..... 87
Distinguished from mines..... 468
A miner is not obliged to purchase his..... 523
Patent proceedings where the, is in two land districts..... 181
Patent may be secured for more than one..... 90

PAGE.

Possessory actions in courts concerning..... 15
Does not, if known to exist, pass with an agricultural patent—how protected..... 121
Proceedings when a, is not within an organized district..... 90
What must be shown to justify taking land in another's possession..... 519
Overseer in Utah may have lien on, when..... 438
Town lots subject to..... 16
A forfeited, cannot be held by Montana..... 492
Status of, in Alaska..... 122
A tailings claim is analogous to... 522
A tunnel location is a..... 318
What timber on a, may be cut.... 28
Cannot be bought under timber and stone law..... 27

**Mining Districts.**—*See Districts—Local Laws.*
Mining deposits to be occupied and purchased according to laws of. 2

**Mining Ground.**
Meaning of term..... 512

**Mining Titles.**
Suits not affected by title in United States..... 15

**Minnesota.**
Mineral lands in, to be sold by legal subdivisions .....13, 23

**Minority.**
Of adverse claimant considered.... 116

**Misdescription.**
In a location notice..... 513

**Mississippi.**
Saline act of 1877 does not apply to..... 68

**Missouri.**
Mineral lands in, excepted from mining laws ..... 24
Saline lands in..... 521

**Montana.**
Local officers in, receive extra fees 16
Residents of, may cut timber..... 26
Width of lode-claims in, located under the Territorial act of Dec. 26, 1864..... 194
Proper construction of a, law about width of surface..... 507
Locations in, are valid only after one wall is found..... 498
Cannot claim a forfeited location. 492
Timber cutting in, authorized by act of June 3, 1878..... 26
Saline law of 1877 does not apply to..... 68

**Monuments.**
What, are sufficient to mark a location..... 503
What side line posts will define a location..... 505
And field-notes, which control ..... 504
Must be kept in position..... 504
When found to conflict with record, which governs..... 504
A location and a survey must refer to some permanent or natural...4, 34
Boundaries of lode-claims must be marked by.....4, 34
The description of a location must refer to some permanent..... 34
A mound of stones or a, must be erected at each corner of a location ..... 34
Only a well known, should be used in a location notice..... 497
Survey must be connected with permanent..... 5
Mineral, how established..... 271

**More or Less.**
The expression, in a contract, how construed..... 494

**Name.**
Digest of court decision relative to, of claim..... 512
Where, in a location notice, differs from that in a conveyance, identity must be shown..... 154
Conveyance of a lode that has more than one..... 495
A party may re-locate his own claim under a new, and thereafter sell it..... 520

**Nebraska.**
Saline lands in; case of Morton *vs.* Nebraska..... 478

**Negligence.**
Or want of diligence forfeits a tunnel location..... 36
Not to ascertain an easily found boundary line is..... 492

**Nevada.**
Local laws recognized by courts of, have the force of legislative enactments..... 501
Mineral school sections are not granted to..... 76
Indemnity lands may be selected by, for lost mineral school sections..... 76
The status of mineral school lands in, considered..... 464
How defenses in, courts must be set up in answer..... 444
Consideration of law of, taxing products of mines and claims .. 468
Early conveyances in, were by transfer of possession..... 516
Local officers in, are entitled to extra fees..... 16
Laws of, alone affect expenditures

PAGE.
on certain claims near Comstock Lode..... 302
Sutro Tunnel in, act concerning. 10, 12
Sutro Tunnel rights protected.... 22
Sutro Tunnel law, text of ..... 25
Saline act of 1877 does not apply to.....68, 336
Citizens of, may cut timber..... 26
Sale of timber and stone lands in. 27
**Nevada County.**
Interpretation of rules in California..... 508
**New Mexico.**
Locations in, of new and abandoned mines..... 76
Timber cutting in, authorized by act of June 3, 1878..... 26
Local officers in, receive extra fees. ..... 16
Saline law of 1877 does not apply to..... 68
**Newspaper.**—*See Publication of Notice.*
Register shall designate, for publication of notice of contest..... 10
May be designated by Commissioner of the General Land Office for publication for notices, when..... 10
Notice of application for patent to be published in, nearest the claim..... 5
Publication of notice, how made in weekly..... 133
Proclamation to be published in, designated.....10, 29
Publication of notice must be in a reputable..... 315
How selected for publication of executive proclamations..... 29
**Nitrate of Soda.**
May be patented..... 52
**Non-Mineral Land.**
Millsites must be on..... .....11, 88
**Non-user.**
Inference of abandonment from, does not apply..... 489
**Notification.**
A record of, must be kept in local office..... 40
**Notice.**—*See Publication of Notice.*
To be posted of claim applied for. 5
Affidavit of two persons as to conspicuous posting of..... 5
Copy of, to be filed in land-office with application for patent..... 5
To be posted in office of Register of land-office..... 5
Claimant's affidavit that, has been posted for sixty days..... 5
Posting, under act of 1866... .....5, 19
PAGE.
Of application for patent, how published..... 5
Form of, for publication..... 532
Form of, posted on claim..... 530
The, given by the Register of the land-office is a summons to all adverse claimants..... 490
Should be prepared by local officers in hearings..... 176
Digest of court decisions as to.... 512
To be posted by applicant for patent, contents of..... 87
Who makes affidavit of posting notice in absence or death of parties who posted it..... 123
Placing a certain, did not constitute a location..... 505
What is, to all others of the claim of the discoverer..... 394
What, of location will protect a claim..... 395
Personal, is not required in mining applications ..... 79
That, and diagram were posted five days after publication began is an irregularity and not fatal.. 163
What the, for posting on lode-claim applied for, must contain..... 87
How given, when a claim is located in two land districts..... 181
Errors which make a, inconsistent will not be deemed fatal unless capable of misleading..... 178
Application for patent rejected because of improper..... 117
Effect of posting, containing several names..... 523
Where proof of posting is clear and specific it will be deemed satisfactory, notwithstanding what..... 191
Proof of posting, and diagram should be specific as to when the period commenced..... 163
Proof of continuous posting of, on claim, how made..... 154
Negative evidence against posting of, considered..... 287
How posted on placer-claims..... 145
Of contests touching character of land, how given..... 10
In hearings to determine character of land..... 47
In case of delinquent co-owner of lode-claim..... 4
How served, in case of delinquent co-owners..... 32
Of tunnel location, how given..... 36
How given in contested coal cases..... 70

PAGE.

What constitutes payment without ..... 521

Occupancy.
The right of, is granted by the act of 1866..... ..... 454

Occupation.
Mineral lands are open to..... 1

Offenses.
Penalty for, concerning mineral lands in California..... 17

Office Work.
Land-office rules as to, of surveys..... .... 45

Oil.
Is a mineral..... 510

Option.
Where party with, is liable for royalty..... 500

Ore.
All, at intersection of veins goes to the oldest location..... 10
Extracted, and machinery may be removed from an abandoned mine..... 192
Extracted, is personal property and taxable..... 468
The term, as used in an indictment for larceny means severance from freehold..... 513
Certain taking of, cannot go beyond *pedis possessio*..... 491
Injunction may prevent second claimant from taking, from point of junction of two lodes.. 93

Oregon.
Local officers in, receive extra fees..... 16
Donation claims in, may embrace coal lands..... 339
Instructions under timber and stone act of 1878..... 65
Sale of timber lands in..... 27

Ouster.
By one tenant in common ..... 445
Certain adverse possession by a tenant in common is..... 490

Paint Stone.
Is a mineral..... 510

Parallel References.
Table of, of acts of 1866, 1870, 1872, coal law and Revised Statute..... 22

Parellelogram.—*See End Lines.*
A lode location is a..... ..... 33

Parol Evidence.—*See Evidence.*
When admitted in a subsequent trial..... ..... 413

Partition.
Where a parol, is effective..... 445
In case of mines and mining-claims..... 508
Of a certain mining tract..... 496

PAGE.

Partner.
When a, can bring an action of ejectment or assumpsit..... 520
When a, cannot be considered dormant..... 520
Possession of one, is possession of all..... ..... ..... 523

Partnership.
Digest of court decisions relating to..... ..... 513
Change of names in a location notice in violation of..... 512
Must exist at the time of discovery for what purpose..... ..... 416
A certain oral contract for, was not within the statute of frauds..... 514
A member may sell his interest without dissolving..... 514
How a mining, differs from ordinary partnerships..... 440

Patent.
Digest of court decisions affecting. 514
Issued under acts of 1866 and 1870 carry all rights given by act of 1872 in absence of adverse rights..... 7
For mineral land, how obtained...4, 37
Surveyor-General shall furnish description for..... 5
When applicant shall be assumed entitled to..... .. ..... 5
Proceedings to secure under act of 1866.....5, 19
For lode-claims issued prior to May 10, 1872, enlarged how..... 32
Shall issue to the several parties according to their respective rights..... 6
Is granted only where the claim has been properly located and worked..... ..... 82
An exception should be inserted in a, if the general records of the land office should show that a portion of the premises applied for have previously been disposed of..... 137
When, may issue to several parties who are shown on the judgment roll to own the claim..... 6
Nothing prevents alienation of, to any party..... 6
Separate, on each location, is not contemplated..... 419
When, under previous laws, shall include rights under present laws ..... 7
What a, for a lode-claim carries with it..... 400
How vein claims must be adjusted to public surveys after..... 6
Does not impair liens..... 9

PAGE.
Will strengthen liens on a mine... 82
Is conclusive at law to what extent. 424
How and for what a, may be impeached collaterally..... 424
Cannot issue for a vein without surface ground..... 220
Mine claimants are not compelled to secure a..... 237
An entry made is equivalent to a, issued..... 237
When broader than the law, is nugatory to that extent..... 506
In a subsequent, it is proper to state that a prior patent had inadvertently issued for part or all of the premises..... 163
That the vendors of the mine have an interest in seeing their title is unclouded is sufficient to support an application to set aside a conflicting..... 163
May be secured for several mining claims..... 90
Where locations cross, unnecessary *habendum* or *reddendum* clauses should not be inserted in a, to prejudice a possible future contest..... 245
In absence of adverse claim, certain evidence of possession of placer mines is sufficient to secure a..... 8
Where there are no adverse interests, a patent will not be disturbed, notwithstanding irregularities in issuing it..... 163
Because an adverse claimant obtains judgment he is not thereby entitled to..... 163
Cannot be issued in face of adverse decision of court..... 75
Ground already patented will be excepted from a subsequent, crossing the same..... 80
Parties who object to the issuance of a, should assert their objections when..... 352
Validity of a, is not affected by a clerical error in the Register's certificate..... 163
When a junior locator applies for a, the senior locator's silence is a waiver of his right..... 352
Wherein doctrine of relation is not applicable to a..... 352
A, for reserved lands is void..... 478
May be delivered to owner of a mine though he be not named therein..... 85
Proceedings in case of loss of Receiver's receipt..... 75
Who is entitled to, under the act of 1866..... 444
Every, grants the right of easement and drainage..... 79
Shall express the right of local legislature to provide easement, drainage, and proper means for development of mining claims.. 11
When a, is recalled..... 87
Proceedings to cancel, improperly issued..... 91
Proceedings when error is discovered in a..... 175
How, is assigned..... 75
May issue to assignee of applicant. 97
It is too late after issue of, to object to certain publication and proof of posting..... 163
A, for agricultural lands does not pass title to known mines..... 454
After an agricultural entry is made, a, should not issue if the tract is shown to contain minerals..... 263
Every agricultural, is subject to water rights..... 11
Expenditure is not required after entry and before..... 32
If no right to a, exists, a patent cannot legally issue..... 264
For reserved saline lands is void .. 521
For agricultural land does not convey known mines..... 176
Minerals discovered after issue of, to agriculturist pass with the patent..... 121
Penalty for falsely making, forging, or dating any paper or..... 17
Presumption as to non-parallel end lines in a..... 352
Title conveyed by, may be alienated to any person..... 2
Rights of foreign corporations under a..... 177
Aliens cannot hold a mining-claim prior to..... 188
Cannot issue for the portion of a mine sold to an alien..... 192
Exemplifications of, and papers how secured..... 83
Act of July 9, 1870, remains in force except as to proceedings to secure..... 8
For placer-claim, how secured.....8, 9, 40
Proceedings to secure, for placer-claims containing a vein or lode. 9
What is conveyed by a placer..... 176
Separate claimants in a placer mine may unite and expend $500 at one point and secure.... 180
For placer-claim containing several tracts, how secured..... 78

PAGE.
Consideration of a, for placer. claims within Leadville, Colorado..... 424
A title to coal veins does not pass with a, for a town-site..... 339
For lode-claims located prior to town-site occupation should not contain clauses of reservation in favor of town-site occupants.... 328
Is not invalid because end lines of a lode-claim are not parallel.... 370
Must express right of easement, drainage, &c..... 11
Forms of, for saline land shall be in form of release..... 29
For a Porterfield Warrant location, carries no title to known mines..... 181
Every, granted or pre-emption or homestead allowed is subject to vested water rights..... 11
Every, issued in the mining regions protects water rights..... 84
Mining claims are excepted, from, for town-site..... 101
May be secured for mill sites, for reduction works and quartz mills 11
For timber lands are subject to water rights..... 27
Cannot issue for tunnel locations. 99
Clause inserted in each, for claims on or near the Comstock Lode. 98
In what, the Sutro Tunnel clause should be inserted..... 225
For mill site, quartz mill, and reduction works, how obtained... 11
For quartz mill and reduction works, how obtained..... 44
Patentee.
A, may be declared trustee for the rightful owner..... 224
Pay-Dirt.
And tailings are property..... 522
Payment.
May be made by several parties who are shown in the judgment roll to own a lode-claim..... 6
For lode-claims, how made.....5, 39
For placer-claims, including lodes, how made..... 9
For lode-claims is $5 per acre..5, 6, 39
How made, when a placer includes a vein..... 9
Of $10 and $20 per acre for coal lands.....14, 69
For trespass on timber lands..... 28
What constitutes, without notice..... 521
Placer-Claim.
Digest of court decisions affecting 515
Definition of..... 7
Survey of..... 8
PAGE.
Shall conform as near as possible to legal subdivisions..... 7
May be patented in manner like lode-claims..... 7
Land-office rules relative to..... 39
Quantity of ground subject to..... 42
Proof required for application for patent for..... 40
Size of, how regulated.....7, 8, 145
Notice and diagram, how posted on..... 145
Survey of, which cannot conform to legal subdivision..... 8
Extent of location of..... 8
Evidence of possession of, sufficient when..... 8
Required expenditures must be shown on plat and field-notes of..... 132
A lode and non-contiguous, cannot be embraced in one application. 236
Within an Indian reservation cannot be patented..... 236
Lodes adversely held within a, may be excluded from the survey of such..... 287
Including five-acre tracts, must be surveyed..... 123
Located after May 10, 1872, must conform to public surveys when on surveyed land..... 115
Are regarded as, on unsurveyed land until township plat is filed. 79
Forms of proof of no veins in a... 535
Proceedings to secure patent when a vein is included.....7, 9
When a lode discovered in a, does not affect application for placer patent..... 312
Several tracts may be embraced in application for patent for..... 78
What is conveyed by a, patent... 176
Expenditure of $500 on, how made..... 145
An unincorporated association owning separate interests in a, may expend the $500 required at one point and secure patent.. 180
Certificate of improvements, how made, when, embrace legal subdivision..... 124
$500 expenditure is not required where right to patent for, is based on statute of limitations.. 312
Of 327 acres may be embraced in one application for patent..... 121
What description of a bar, was sufficient..... 498
Auriferous cement claims are patented as a..... 7
Copper and cinnabar cannot be located as a..... 83

PAGE.
Where a mill site is within a, a hearing may be had to determine sundry facts: 222
Consideration of a patent for, within the limits of Leadville.. 424
If a, was located prior to a townsite no townsite excepting clause should be inserted in the placer patent 232
Is not subject to townsite entry. 324
Is paid for at $2.50 per acre, how patented 41
Where a lot of land, on which is an arastra, may be an adverse claim to a 490
Annual expenditure on, is not required 133
Annual expenditure on, may be required by local laws 312
**Placer Law.**
Of July 9, 1870 22
**Plat.**—*See Survey.—Township Plat.*
To be filed with application for patent, how prepared 4
Copy of, to be conspicuously posted on claim 3
On filing of, Register to publish notice 3
Affidavit of claimant that, has been posted 3
When prepared under act of 1866.3, 31
Size and preparation of 161
Land-office rules as to 37
Proof of continuous posting of, on claim, how made 154
Posted on claim must be copy of the one filed with the application for patent 154
Applicant's affidavit that, and notice remained posted 38
Surveyor-General's certificate of improvements to the, endorsed on 38
The $500 expenditure, how shown upon, of four classes of mining-claims 132
Any, filed cannot be objected to as a copy and not an original 209
What, must show lines of original location 330
Must be filed by adverse claimant. 39
Survey and, shall be made of placer-claims which do not conform to public surveys 8
How posted on placer-claims 145
Of mill site to show what 43
**Penalty.**
For illegal cutting of timber on mineral lands 26
For false swearing in purchase of timber land 27, 65
For offenses concerning mineral lands in California 17
**Perjury.**
Penalty for, under timber and stone law 28
**Petroleum.**
Claims may be patented 160
Is a mineral 510
**Porterfield Warrant.**
Land on which a, can be located.. 181
**Possession.**—*See Adverse Possession.*
Digest of court decisions relative to 515
Law of, shall govern in what suits 15
May be, how maintained 421
Erection of discovery stake is sufficient, when 394
Actual, is not necessary to protect a valid mining-claim 402
Right of, depends on local laws... 501
Miners' laws govern, of claims how far 3
Of one partner or tenant in common is, of all 523
By an alien, also jointly by an alien and a citizen 4, 370
Is proof of title against one who shows no better 524
Actual, is good title against one who can show no better 418
A complaint by claimant in, may be sustained against adverse claimants out of 490
Actual and constructive, under a certain conveyance 496
Adverse, does not invalidate a conveyance made by a party out of. 495
Of mining-claim, how secured and maintained 3
Abandonment can occur only where there has been 489
Abandonment creates a vacancy in 489
May be continued in another by gift or otherwise 489
The doctrine of abandonment only applies where there has been only naked, without paper title. 490
Title passed by 496
When, can only be conveyed by deed 489
Fencing is not necessary to 493
Priority of, as affecting agricultural claims 491
What, is required before discovery of mineral 399
Entire, of claim may be recovered under color of title, against trespasser 419
Actual, is *prima facie* evidence of title, to what extent 526

PAGE.

Mere, is good against naked trespass..... 413
A junior location cannot extend over senior discovery when..... 504
Removing an agent does not change..... 491
A rule of, applied to re-locations.. 489
Working in a tunnel to develop a claim is, of the claim..... 498
Evidence of, of placer-claims, sufficient when..... 8
How, may be secured for land valuable alone for tailings..... 522

**Possessory Action.**
In court, not affected by the fact that the paramount title is in the United States..... 15

**Posting.**
Of location notice, how performed..... 512
Land-office rules as to, notice on claim applied for..... 87
Where proof of, is clear and specific, it will be considered sufficient, notwithstanding what.... 191
Negative evidence against, of notice considered..... 287
That notice and diagram were posted five days after publication began is an irregularity, and not fatal..... 163
Affidavit of continuous, on claim, how made..... 154
In case a claim lies in two land districts..... 181
Forms of, proof of.....530, 531
Proof of, notice and diagram should be specific as to when the period commenced..... 163
Proof of, on contested land in hearings..... 46, 52

**Power of Attorney.**—*See Attorney.*
A verbal, is sufficient to allow an agent to sign his name to a deed when..... 520
Must accompany proof of citizenship when..... 45
A board of directors cannot grant an irrevocable..... 491

**Practice Act.**
Possession must be shown to sustain an action under the California, section 254..... 517

**Pre-emption.**
List of lands not subject to..... 16
The mining right is in the nature of a..... 444
The right of, of mining lands is not obligatory..... 454
Right of, to non-mineral lands.... 12
Of coal lands, how made.....13, 14, 69

PAGE.

Coal lands are excluded, as mines, from..... 29
What lands unfit for, are subject to entry under timber law..... 65

**Pre-emption Claim.**
Every, allowed is subject to vested water rights..... 11
Section 2330 cannot defeat *bona fide*, in agricultural land..... 7
Mineral land in certain States may be embraced in..... 13
When recognized in mineral regions..... 12

**Pre-emption Claimant.**
May enter agricultural land less than 40 acres left by mineral survey..... 8

**Pre-emption Entry.**
Coal lands cannot be embraced in a..... 389

**Pre-emption Law.**
Excludes coal lands as mines..... 30

**Preference Right.**
Who has, of entry of coal lands..13, 70

**Prescription.**
What constitutes..... 497

**President, The**
May establish additional land districts..... 12

**Presumption.**
As to, of compliance with local laws and of their existence..... 502

**Private Entry.**
Of coal lands, instructions..... 69
Saline lands offered and not sold at public sale are subject to... 29, 68

**Private Lands**
It is a trespass to extract minerals from..... 525

**Private Land Claim.**
Patent for, carries the precious metals..... 514
Minerals within unconfirmed, how treated..... 308

**Proclamations.**
All Executive, to be published in designated newspaper..... 29

**Profit a Prendre.**
How distinguished—what constitutes..... 497

**Proof.**—*See Evidence.*
The order or time of presenting, of compliance with law in applications is second to the, itself... 199
Required in mining cases may be made how..... 10
Of citizenship..... 2
Of citizenship under Secretary's ruling of July, 1876..... 194
Naturalization, how proved..... 370
In case a claim is located outside any organized district..... 90

PAGE.
Required in absence of district laws..... 115
Form of, in absence of records.... 533
Additional, may be called for by the Surveyor-General as to the required expenditure..... 221
Defective, in an application for patent considered..... 291
Required where proceedings have been had against delinquent co-owners ..... 217
Form of, of publication..... 532
Form of, of posting notice on claim..... 530
Form of, of posting during publication..... 531
Form for, of labor..... 527
Required in placer applications. 42, 43
Certain, called for in placer application..... 180
Required in applications for mill sites..... 44
Required in hearings to determine character of land.....46, 47
**Property.**—*See Real Estate.*
A mining-claim is personal..... 511
A mining-claim in Utah is real.... 511
A mining-claim is a freehold estate 512
Pay-dirt and tailings are..... 522
Vested rights of, are secured by legal possession under local laws 515
**Protest.**—*See Adverse Claim.*
May be examined by applicant for patent ..... 98
**Protestant.**
Has no right of appeal.....204, 214
Can be a party only to show non-compliance on the part of the applicant..... 210
Not properly an adverse claimant is not required to pay the fees for filing protest..... 272
Where the adverse claimant does not pay the fees for filing, he will be treated as a..... 191
Where proof of posting is clear and specific, it will be considered satisfactory, notwithstanding allegations by the, to the contrary. 191
When a tunnel location, failing to assert an adverse claim, becomes a..... 318
**Prospecting Contract.**—*See Partnership.*
**Publication of Notice.**
Affidavit of applicant for patent to be filed after..... 5
Land-office rules as to, of application for patent..... 38
Land-office rules as to charges for. 45
Must be made in newspaper nearest the claim.....135, 198
PAGE.
Must be in a reputable newspaper. 315
In application for patents how made and evidenced..... 5
Certificate of Surveyor-General to be filed during..... 5
Notice to be posted on claim during..... 5
Adverse claim to be filed during...5, 39
Under act of 1866.....5, 18
Not to stop because an adverse claim is filed..... 6
How adverse claims are affected by second..... 272
Sixty days of, how estimated..... 124
Adverse claim must be filed within sixty-three days in case, is in a weekly newspaper..... 261
How made in weekly newspapers. 133
May be in newspaper partly printed elsewhere..... 204
Must be made in only one newspaper..... 136
What is satisfactory proof of..... 209
Manifest typographical error in the, not capable of misleading is not fatal..... 287
Is not excused when the applicant bases his claim upon the statute of limitations..... 259
Without Register's knowledge defeats application..... 135
It is too late after issue of patent to object to a certain..... 163
A stipulation is void, which agrees that an adverse claim may be filed twenty days after expiration of..... 257
An adverse claim to be considered must be filed during..... 178
Where the daily issue of a paper is designated, a change to the weekly issue is permitted only by authority of the Register..... 189
How made where several placer tracts are embraced in one application..... 78
To be paid for by claimant..... 9
Where selection is desired, as agricultural, of lands returned as mineral..... 58
Required in proceedings touching certain lands claimed by the C. P. R.R. Co..... 280
Form of proof of..... 532
Published notices, how numbered 187
In hearings to determine character of land.....10, 47, 53
In hearings should be made by order of the local officers..... 176
In case of delinquent co-owners...4, 32
In the Highland Chief *vs.* Prince of Wales case considered..... 163

PAGE.
Under timber act of June 3, 1878. 28, 65
How made, under timber and stone law.....28, 66
In coal land cases, how made..... 70
**Public Sale.**
Mineral lands in Michigan, Wisconsin, and Minnesota may be offered at..... 13
Of saline lands, how made.....29, 68
Coal lands may be disposed of at. 30
**Public Surveys.**—*See Surveys.*
Are extended over mineral lands.. 8
**Public Highway.**
Cannot be an adverse claim..... 83
**Publisher.**
Agreement of, to be filed by applicant for patent..... 38
Form of agreement of..... 532
**Purchase.**
Mineral lands are open to..... 1
Local laws cannot limit the number of claims a party may acquire by..... 502
No law prohibits the, of several placer-claims..... 145
A miner is not obliged to make, of his claim..... 523
**Purchase Money.**
When repaid and when not..... 76
**Purchaser.**
May conceal mineral worth of tract bought..... 509
Takes only the title held by vendor..... 524
Of a mining-claim from an alien may re-locate and secure a title. 188, 370
Distinction between, and locator. 419
**Quarry.**
Distinguished from a mine..... 509
**Quartz.**
Loose and solid, is embraced in a lode location..... 508
Only veins of, or other rock in place could be applied for under act of 1866.....5, 19
Lode of, or other rock in place may be patented..... 2
**Quartz Mill.**
Owner of, may secure patent for mill site..... 11
**Quartz Mill Site.**
Land-office rules for acquiring title to a..... 44
**Quartz Mine.**
A case of ownership of a California..... 525
**Railroad.**
Price of coal lands depends upon distance from a.....13, 345
**Railroad Corporations.**
PAGE.
Timber cutting not allowed to.... 26
**Railroad Grant.**
How lands returned as mineral may be selected under a..... 58
What shall not include mineral lands..... 13
**Railroad Exceptions.**
In case of minerals and mineral lands.....509, 510
**Real Estate.**—*See Property.*
When tenants in common can only acquire claims in the manner prescribed for securing ..... 523
Mining-claims are.....511, 520
Quartz claims are..... 524
Extent to which claims are treated as..... 419
**Receiver of the Land-Office.**
When, will issue receipt for money paid by applicant for patent..... 39
In absence of Register, will give notice to both parties of filing of adverse claim..... 40
Endorse date of filing on adverse claim, when..... 40
Affidavit of citizenship may be sworn to before..... 45
An entry of a mine by the, is improper..... 241
Duty of, under timber and stone law.....27, 28
Duty of, in coal land cases..... 69
**Receiver's Receipt.**
Names of all applicants must appear in the, where unincorporated companies apply for patent..... 122
What proof is required to admit a, in court..... 515
Proceedings to secure patent where, has been lost..... 75
Patent may issue to assignee named in..... 97
**Record.**
Digest of court decisions affecting the, of claims..... 519
Of location governed by local laws, how far..... 3
Of a lode-claim, when made...3, 34, 35
Of a location must contain such a description as will identify the claim..... 259
Consideration of the, of claims.... 413
Evidence of, title to be filed by applicant for patent..... 37
Evidence when, has been lost or destroyed..... 38
The district, is admissible evidence when..... 520
When, of claims is necessary...371, 382
Object and effect of.....382, 383

PAGE.
Forfeiture by failure to make..... 382
Notice where, is not required..... 382
Record.
Of locations is unnecessary under laws of Congress..... ..... 503
Decides date of location..... ..... 122
Effect of mistake in, as to one side line..... ..... 505
When parol evidence cannot contradict the..... 504
Effect of failure to file a certain Colorado location certificate.... 503
Of tunnel locations to be made.... 36
Of tunnel lodes, how made..... 90
Under a certain Montana law, of placer claims is not required.... 515
Form of proof in absence of..... 533
Form of, of first meeting of a corporation..... 548
A, of notifications must be kept in the local offices..... ..... 38
Recording.
Local laws govern mineral claims. 3
Recorder.—*See District Recorder.*
Applicant's affidavit should be supported by evidence from the office of the..... ..... 37
Of the district should certify to abstract of title filed with adverse claim..... 123
Reduction Works.
Title to, how secured.....11, 44
References.
Parallel, between acts of 1872, 1866, 1870, and Revised Statutes..... ..... 22
Register of the Land Office.
Duty of, in connection with application for patent..... 5
Affidavit of citizenship may be sworn to before..... 45
Shall publish notice of application for patent, when.....5, 38
Shall post notice of application in his office..... 5
Certificate of Surveyor-General as to improvements and correctness of plat to be filed with..... 5
Duty of, in connection with applications under act of 1866.....5, 18
When plat and field-notes of lode-claim must be sent to..... 37
Must certify to posting notice in his office in applications for patent..... 39
Must preserve consecutive number of mineral entries..... 39
When will permit applicant for patent to pay for land..... 39
Copy of judgment roll to be filed with, when..... 6
Proceedings after judgment roll is filed, to be certified by, to the Commissioner of the General Land Office..... 6
Land-office rules as to duty of, in application for patent..... 37
Adverse claims must be filed with the, when..... . 40
Notice by, as to filing of adverse claim..... ..... 40
Must endorse date of filing on adverse claim..... ..... 40
The filing of an adverse claim with the, is sufficient..... 124
Shall designate newspapers for publication of notice of contest, and require proof that the notice has been duly given..... 10
Duty of, as to publication of notice of application for patent, Land Office rules.....38, 39
Has no discretion in the matter of publication of notice in papers nearest the claim, except the choice of two equally near..... 198
A change from daily to weekly issue of newspaper for publication of notice is allowed only on authority of..... ..... 189
Application rejected because notice was published without knowledge of..... 135
The notice given by the, is a general summons..... 490
Cannot act as an attorney, and taking money as such is extortion..... ..... 492
Form of certificate of posting..... 531
A clerical error in a name in the final certificate of the, does not affect the validity of a patent issued under the proper name.... 163
Names of applicants must all appear in the certificate of the, where unincorporated associations apply for patent..... 122
Each claimant must file with, a statement of fees and money paid..... ..... 10
Applications for coal land to be made to..... .....13, 14, 68
Duty of, under timber law of June 3, 1878.....27, 28, 65
Register and Receiver.
Land-office rules in applications for patent..... 37
When the final papers will be made out in the name of the assignee of an applicant..... 97
Proof of citizenship may be taken before ..... 44
Should not receive a second application for patent for land when 283

PAGE.

Adverse claim to be filed with.... 5
Filing adverse claim with Register is filing with..... 124
Jurisdiction of, over adverse claims..... 98
Papers filed in the local land office cannot be taken therefrom, but if in the nature of a protest, may be examined by the applicant..... 98
Report of, at end of month..... 46
Preserve an unbroken series of numbers for mineral entries.... 44
Letters sent to the, are government property, and should be retained in the local office..... 99
Papers filed with the, cannot be withdrawn..... 136
A copy of the decree and certificate of clerk of court must be filed with, when suit is decided in favor of applicant for patent. 123
Evidence taken before certain officers is same as before..... 10
When hearings to determine character of land should be held before..... 57
Notice in hearings should be prepared by the..... 176
There is no compulsory process to cause witnesses to appear before 74
Must report to Surveyor-General when a mineral entry is made or cancelled..... 64
Errors in field-notes cannot be corrected by the..... 234
No person can act as deputy for the..... 187
Did not disobey instructions in the New Idria case..... 249
Statement by applicant for patent of moneys paid the..... 10
Fees and commissions allowed, under the land laws..... 15
Fees of, in mining cases.....10, 16, 39
Land-office rules as to fees of..... 46
Duty of, under timber cutting act of 1878.....26, 66
Fees of, under timber act of June 3, 1878..... 66
Duty of, under saline law of 1877. 29, 68
Must forward the original coal D. S. to the General Land Office... 341
Duty of, under coal law of 1865 .. 30

Regulations.—*See Local Laws.*
Cannot limit width of locations to less than twenty-five feet..... 2
To be prescribed by Commissioner of the General Land Office under timber act of 1878..... 28
The Commissioner of the General Land Office may make all needful, under the coal land laws...14, 69

Relation.
Wherein the doctrine of, is not applicable to a patent..... 352

Relinquishment.
What should be stated in a, of an erroneous patent..... 176

Re-location.
Digest of court decisions relative to..... 519
Failure to work a lode-claim subjects it to..... 4
When a lode-claim, located since May 10, 1872, is subject to..... 32
When a mine becomes subject to re-location under the act of January 22, 1880 ..... 275
When lode-claims are and are not subject to.....32, 35
Can be made only after the expiration of the year next succeeding that for which the last required expenditure was made... 255
Expenditures on a, by whom made 161
A, by the purchaser of a claim from an alien may secure title by..... 188
Where an adverse claim is based on a, made prior to application for patent, the courts must decide..... 291
Until an abandonment is shown, a, cannot be made by other parties..... 224
After making, of an abandoned mine, the party may continue work in the old shafts, or commence new tunnels, etc..... 192
A rule of possession applied to.... 489
Effect of, under new district laws. 82
When, may be made by one cotenant to the exclusion of the others..... 300
How prior expenditures are affected by..... 300
To be effective at any time must be valid when made..... 402
When a, cannot be allowed to interfere with other claims..... 504
A party in possession under a title proved invalid may make a, of the ground..... 515
When a claim is not subject to.... 402
Location under local law of 1,400 feet, and under act of 1866 of 3,000 feet, held to be a good..... 178
A certain, to include 200 feet was void ..... 147
A certain, of 3,000 feet was held illegal..... 235
Proof required in a, in Colorado.. 175

PAGE.

Should be made of Black Hills mines located prior to February 28, 1877 ..... 212
Placer-claims are subject to, if local laws requiring annual expenditures are not complied with ..... 312

**Repayment.**
Of purchase money when made and when not ..... 76

**Repeal.**
Of section 4751 Revised Statutes, relative to timber in certain localities ..... 29
Of law of 1866 does not affect existing rights ..... 7

**Repeal Provisions.**
To take effect on acts passed prior to December 1, 1873 ..... 18

**Reservation.**
Of mineral lands unless otherwise directed ..... 1
Where an act of Congress protects "vested rights," a location on a, is not protected, but is void.. 479
What mineral lands may and may not be included in a ..... 310
A placer cannot be located or patented when within an Indian... 236
Of minerals in the Indian Territory ..... 119
A patent for reserved salines is void ..... 521
No, of salines or minerals in Michigan school sections ..... 521

**Reservoirs.**
Agricultural patent is subject to rights for ..... 11

**Resident.**
Parties who do not reside in or are temporarily absent from the land district may apply for patent by agent ..... 24, 267

**Revised Statutes.**
Section 2318, p. 1; 2319, p. 1; 2320, p. 2; 2321, p. 2; 2322, p. 3; 2323, p. 3; 2324, p. 3; 2325, p. 4; 2326, p. 6; 2327, p. 6; 2328, p. 7; 2329, p. 7; 2330, p. 7; 2331, p. 8; 2332, p. 8; 2333, p. 9; 2334, p. 9; 2335, p. 10; 2336, p. 10; 2337, p. 11; 2338, p. 11; 2339, p. 11; 2340, p. 11; 2341, p. 12; 2342, p. 12; 2343, p. 12; 2344, p. 12; 2345, p. 13; 2346, p. 13; 2347, p. 13; 2348, p. 13; 2349, p. 14; 2350, p. 14; 2351, p. 14; 2352, p. 14; 910, p. 15; 2238, p. 15; 2258, p. 16; 2386, p. 16; 2406, p. 16; 2471, p. 17; 2472, p. 17; 2473, p. 17; 5596, p. 18.

PAGE.

**Right of Way.**
Digest of court decisions relative to ..... 520
For construction of canals and ditches is granted ..... 11
Over a mining-claim is protected.. 83
California law of 1870 relating to. 520
Compensation for, over mines, etc. 520

**Rock in Place.**
Only veins of, could be applied for under act of 1866 ..... 5, 18
Definition of ..... 52, 82

**Royalty.**
Where party with option is liable for ..... 500

**Rules.**—*See Regulations.*

**Rules of Miners.**—*See Local Laws.*

**Sale.**
Digest of court decisions as to.... 520
Mineral lands are reserved from, except otherwise directed ..... 2
Lands set apart by the Secretary of the Interior as agricultural are subject to ..... 12
The portion of a mine sold to an alien cannot be patented ..... 192
Parol, accompanied by delivery of possession, formerly conveyed title in California ..... 518
Mineral lands in Missouri and Kansas excepted from the mining law ..... 24
Mineral lands in Michigan, Wisconsin, and Minnesota, are subject to, like agricultural lands...

**Saline Lands or Salines.**
Act of January 12, 1877, relative to ..... 29
Rulings relative to ..... 333, 337
Digest of court decisions relative to ..... 521
Instructions dated April 10, 1877. 68
Are not reserved in Michigan school sections ..... 521
Case of Morton *vs.* State of Nebraska ..... 478
Sulphur springs are not ..... 75
Lands containing, are not subject to pre-emption ..... 16

**Salt Springs.**—*See Saline Lands.*

**School Grant.**
The California, is in the nature of a float ..... 101

**School Section.**
Digest of court decisions relative to ..... 521
There can be no, until township lines are run ..... 101
Title to a, vests in the State on survey if mineral character is unknown at that date ..... 212
The grant of, to California does

PAGE.
not embrace mineral lands..... 458
The State of California cannot secure lieu lands for lost mineral. 224
Status of mineral school sections in Colorado..... 261
There are no reservations of minerals or salines in Michigan..... 521
The status of, in Nevada..... 464
Mineral, is not granted to State of Nevada..... 76
In Wyoming containing coal..... 337
In California containing coal..... 340
In Colorado containing coal..... 341
**Secretary of the Interior.**
May, on survey thereof, set apart non-mineral land for pre-emption and homstead entry..... 12
Clearly agricultural land may be set apart by the, in mining regions..... 101
Shall withdraw land at mouth of Sutro tunnel..... 25
May prescribe rules relative to timber cutting..... 26
Proclamations to be published in newspapers to be designated by 29
**Sections Sixteen and Thirty-six.** —*See School Section.*
**Segregation.**
Of mineral from agricultural land. 48
Remnant of agricultural land after, how disposed of..... 8
The failure of government surveyors to segregate mineral from agricultural lands does not defeat miners' rights..... 454
**Settlement.** — *See Agricultural Lands.*
On school sections prior to survey excepts them from the State grant..... 101
The form of, required to except land from school grants..... 458
On lands withdrawn as mineral by Secretary Delano..... 56
**Settlers.**
*Versus* miners, hearings.....46, 47, 53
Ditch owners who injure the improvements of, must pay damages..... 11
Improvements of, cannot be taken under timber and stone law..... 27
**Severance.**
There may be a, of title to the surface and the minerals beneath... 524
**Side Lines.**
Effect of a lode's departure from... 508
When the lode leaves the, of a patented claim..... 514
A lode cannot be followed beyond the, of a claim..... 514
Veins may be followed beyond.... 31

PAGE.
**Sioux Half-Breed Scrip.**
Cannot be located on mineral land..... 187
Kind of land it may be located upon..... 187
**Silver.**
Extent of claims of, on veins..... 2
Veins of, gold, cinnabar, and copper only could be patented under act of 1866 .....5, 19
Timber lands containing, not subject to sale.....27, 65
Lands containing, cannot be sold under the coal laws.....12, 69
**Slate.**
Deposits of, may be patented..... 143
**Soda.**
Carbonate and nitrate of, may be patented..... 52
**Soldier.**
Proof of citizenship by a..... 88
**Spanish Grants.**
Minerals within unconfirmed, how treated..... 308
**States.**
Certain, excepted from the mining laws.....23, 24
**State Laws.**
In absence of, district laws govern locations..... 82
**State Selections.**
How, are made in mineral regions..... 113
By California, cannot be made in lieu of sections lost as mineral.. 224
By Nevada can be made in lieu of school sections lost as mineral.. 76, 464
Timber lands embraced by, not subject to sale.....27, 65
**Statute of Frauds.**
A certain contract was not within. 513
**Statute of Limitations.**
Digest of court decisions relative to..... 521
Lapse of time short of the, is no proof of abandonment..... 488
Constitutes part of the local laws governing claims..... 445
The, applies to lode-claims under the mining laws..... 521
Adverse possession claimed in an Iowa case by reason of..... 491
Rights within limit of, cannot be asserted after complete abandonment and appropriation of claim by another..... 489
An applicant who bases his right of entry upon the, is not excused from publishing the required notice..... 259
How possession of placer-claims

PAGE.
may be evidenced..... 9
Applied to placer location rights—land-office rules..... 43
Placer-claims held longer than the period prescribed by the, may be patented in the absence of adverse rights..... 9
$500 expenditure is not required where placer-claimant bases his right to patent on..... 312
When, begins to run against a tenant in common..... 523
Stipulation.
A, that would allow an adverse filing after expiration of publication of notice, is void..... 257
A certain, was a waiver of the adverse claim..... 146
Stock.
Form of certificate of..... 547
Stockwerke.
Definition of..... 52
Stone.
Is a mineral..... 510
Timber and, law of June 3, 1878.. 27
Instructions under act of June 3, 1878..... 65
Subdivision.—*See Legal Subdivision.*
Applicants must pay for the, of sections and placer-claims..... 9
Subpœnas.
Parties to a hearing serve their own..... 74
Suit.
If, be commenced by a party, who subsequently filed an adverse claim, the application proceedings will be stayed..... 146
Will avail nothing if commenced in a court of a district within which the claim does not lie..... 257
Proceedings when, has been decided in favor of applicant..... 123
Title acquired after, is brought cannot affect the decree..... 524
When the adverse claimant has failed to commence, the applicant must prove that fact..... 235
A pending, will not excuse the annual expenditure..... 255
Form of certificate that no, is pending..... 534
When second suit will not stop proceedings on application..... 137
Proceedings where title is not shown in either party to..... 25
Sulphur.
Deposits of, may be patented...52, 230
Sulphur Springs.
Are not regarded as mineral or saline..... 75

PAGE.
Sunday.
An adverse claim may be filed on, or out of office hours..... 245
Superintendent.
Declarations of a, cannot reduce a location..... 507
Surface Ground.
Digest of court decisions as to..... 521
Reasonable quantity allowed under act of 1866..... 2
Rights of a locator on a vein as to..... 3
Amount of, under lode locations. 33
When, of other claimants cannot be entered upon..... 3
Amount of, to be paid for, how shown..... 223
The abandonment of, by the applicant does not end a conflict.. 202
How surveyed where claims overlap or are triangular in shape... 236
In absence of surface conflict, the possibility of a future union of two lodes should not delay issue of patent..... 93
No, can be recovered in a suit for a blind ledge..... 508
No patent can issue for a lode without..... 220
How, for a tunnel lode is ascertained..... 220
Surface Lines.—*See Side Lines and End Lines.*
When, cannot be changed..... 508
Survey.
Of lode-claim, how made..... 4
Land-office rules..... 37
Circular of Nov. 20, 1873, relative to, of mining-claims..... 58
Circular of Nov. 13, 1877, relative to..... 61
Extended over the mineral lands.. 16
Of waste and useless lands is not required.....8, 16
Of a mine before location cannot be the official survey..... 230
The official, must be made subsequent to location..... 62
Deputy mineral surveyors cannot make a, beyond their district... 88
Should be made according to the location..... 281
The official, must be made after location..... 62
Of mining-claims must be according to location lines..... 58
Must be denied where locations are not properly made and marked..... 330
Must show lines of original location..... 330
Application for patent denied

PAGE.
where, does not agree with description..... 83
Expenses of, how paid..... 9
Maximum charges for, how established..... 9
What, shall have priority in the office of Surveyor-General..... 62
First applied for, has priority in all stages in the Surveyor-General's office..... 299
Establishment of proper mineral monuments..... 271
Land office rules as to charges for. 45
Proceedings when errors in, are found..... 100
Does not withdraw land unless followed by application for patent. 217, 233
How second, of tract already surveyed is procured..... 217
Conflicts in making a, how shown 217
Amount of surface ground to be paid for, how shown..... 223
Boundary lines of a certain, considered..... 304
Instructions where a party desires a, of a tract already surveyed... 217
A second, was ordered of surface ground embraced in application after an adverse claim was rejected..... 113
Where a, overlaps another or is triangular in shape..... 236
The question of, in a certain case, must be decided by the courts... 273
An entry for, is enough possession to support an adverse suit..... 516
Where an adverse claimant was prevented from securing, by action of the applicant, he should not be excluded on that account 127
Must be made of adverse claim.... 40
Adverse claimants cannot color part of an applicant's, and call it his adverse claim..... 143
Exhibit professing to represent the survey of an adverse claim must be attached to the protest. 143
Proceedings where, cannot be made of adverse claim..... 331
Only the claimant can appeal from the approval or disapproval of... 281
End lines of, must be parallel; courses and distances give way when in conflict with fixed objects..... 194
The public, may be adjusted to locations on unsurveyed land when .....2, 6, 19
The Surveyor-General may vary from rectangular form, when... 2
Every, of a lode-claim, must be connected with a public survey corner, mineral monument, or permanent natural object..... 259
An irregularity considered in failing to file with the request for a, a copy of the location notice..... 221
A conflicting, already patented, cannot be an adverse claim..... 178
Lodes adversely held within a placer-claim may be excluded from the, of such claim..... 287
When required and not required in placer applications..... 41
Must be made of a placer-claim embracing five-acre lots..... 123
Entry of placer-claims shall conform as near as possible to legal subdivisions of the public..... 7
Of placer-claims which cannot conform to legal subdivision..... 8
A tunnel lode will not be surveyed until the surface ground is ascertained..... 220
Of mill site, how made ..... 44
Where a State law directs the, of saline lands a reservation is implied..... 521
Public, in California and Michigan contrasted..... 101
How agricultural land is segregated.....49, 54, 55
Upon the, of non-mineral lands the Secretary of the Interior may set apart the same..... 12
How subdividing, may be done... 16
Agricultural land less than forty acres left by mineral, how entered..... 8
Settlement on school lands prior to, excepts them from the State grant..... 101
Title to school sections vests in the State on, if their mineral character is unknown at that date..... 212
School sections surveyed after her admission as a State, pass to Colorado when mineral is unknown therein at date of survey. 261
Whenever a settlement is made on a school section prior to, the land is excepted from the grant to California..... 458
Certificates of deposits for, will not pay for coal lands..... 342
Surveyors.—*See Deputy Mineral Surveyors.*
Deputy, to be appointed by Surveyor-General..... 9
How appointed by Surveyor-General..... 45
The, is not required to determine

PAGE.
the course of a lode in an application for patent..... 514
The failure of, to segregate mineral from agricultural lands cannot defeat miner's rights..... 454
County and local, may subdivide sections.....8, 16
Certificate of, as to value of improvements on adverse-claim.... 40
Map of U. S., cannot prove character of land .... ..... 510
Surveyor-General.
Plat and field-notes filed with an application must be made under the direction of.....4, 37
Land-office rules as to applicant for patent..... ..... 37
Circular of Nov. 20, 1873, relative to surveys of locations by original bounds..... ..... .... 58
Circular of Nov. 13, 1877, relative to appointments by ..... 61
Circular of Sept. 13, 1878, relative to improvements and date of survey..... ..... 62
Circular of Jan. 20, 1879, relative to reports to, of mineral entries. 64
Certificate of, as to value of labor and improvements.. ..... 6
Certificate of, as to value of labor and improvements to be filed before expiration of publication of notice..... 5
Certificate of, as to improvements, in case of judgment on an adverse-claim..... ... 6
Shall furnish description of claim to be incorporated in patent.... 5
Duty of, in applications under act of 1866.....5, 18
Certificates of, in field-notes of surveys.....60, 61
Is not required to make a separate certificate of $500 expenditure. It is endorsed on plat and field-notes..... 209
Certificate of, as to improvements, how made..... 38
How, must designate surveyed mineral claims..... 39
Lands returned as mineral by, will alone be treated as such.... 47
Duty of, as to incompetent deputies..... ..... ..... 61
How, should derive his information as to value of improvements on a claim..... 62
More proof may be called for by the, if not satisfied that the required expenditure has been made..... ..... 221
Does not make certificate of improvements, when placer-claims embrace legal subdivisions..... 124
Under act of 1866, certified to character of vein exposed..... 82
Duties of, in appointing deputies. 9, 45
Duty of, in segregation of mineral land..... .....49, 53, 54
An applicant alone can appeal from the approval or disapproval of a survey by the..... 281
Should not approve a survey made prior to location as the official survey..... ..... 280
Should refuse to approve the survey of a location not made in accordance with the district laws. 283
In case a portion of a claim is abandoned the, must forward amended plat and field-notes if required..... 204
Mineral claims, how designated by, on township plat..... 39
In extending public surveys shall adjust them to patented claims. 6
In adjusting public surveys to certain locations, may vary from rectangular form when..... 2
Instructions to deputy mineral surveyors in States where the Commissioner is *ex officio*..... 161
Did not disobey instructions in the New Idria case ..... 245
Surveyor's Return.
Any person may appear at a hearing to sustain the..... ..... . 183
Sutro, A.
Rights of, protected by Section 2344, Revised Statutes..... 12
Sutro Tunnel.
Act of July 25, 1866, relative to... 25
Hearings may be had to determine facts as to the..... 197
The land embraced within the site of the, has been withdrawn..... 98
Sutro Tunnel Act.
Meaning of the words "discovered" and "developed" in the. 225
Sutro Tunnel Clause.
In what patents the, should be inserted..... ..... 225
Inserted in Comstock Lode patents 98
Sutro Tunnel Grant.
Includes lands west of Comstock Lode..... 302
Status of certain claims within the 302
Sworn Statement.—*See Affidavit.*
Tailings.
Digest of court decisions relating to..... ..... 522
What indicates abandonment of... 489
Taxation.
Extracted ore is subject to..... 468

PAGE.

**Ten-acre Tracts.**
In mineral region are legal subdivisions ..... 7
Land-Office rules as to..... 47
Evidence in hearings relative to character of land should touch every..... 176

**Tenant in Common.**—*See Cotenant.*
When a parol partition causes parties to cease to be..... 445
Ouster by one of several..... 445
Digest of court decisions as to.... 523
How to re-locate and leave out the name of a..... 520
What constitutes adverse possession by..... 490
When one, may compel assignee of other cotenants to an accounting..... 440

**Tennessee.**
French-Lick case in Nashville..... 521

**Territories.**
Timber cutting in the, authorized by Act of June 3, 1878..... 26

**Testimony.**—*See Evidence—Proof.*
Under the mining acts may be taken how..... 10
As to the limits of a location..... 506
Should be by question and answer in hearings..... 176
Local officers' fees for reducing, to writing..... 16
In hearings touching character of land, should be taken by question and answer ..... 176
To show value of assessment work 421
As to local rules and customs may be introduced in mining controversies..... 502
May be taken before the Register and Receiver as to alleged saline lands.....29, 68
Form of, under timber and stone law..... 67
As to saline lands, how taken..... 29

**Thirty-eighth Congress.**
No act passed at the first session of the, shall be construed as granting mineral lands to States, roads, or corporations..... 13

**Timber.**
Digest of court decisions as to.... 523
Owners of mill sites have the, growing thereon..... 178
The, on the tunnel lines belongs to the tunnel owner..... 222
And stone law of June 3, 1878.... 27
Within limits of grant to C. P. R.R., how treated..... 144
Definition of, in railroad act of July 1, 1862..... 523
Penalty for unlawful cutting of... 28

**Timber Cutting.**
Act of June 3, 1878, authorizing citizens of Colorado, Nevada, and the Territories to fell and remove timber..... 26
On public land, allowed where.... 26

**Timber Culture Entry.**
Coal lands cannot be embraced in a 345

**Timber Lands.**
Act of June 3, 1878, relative to sale of..... 27
Instructions under Act of June 3, 1878..... 65

**Tin.**
Deposits of, may be patented..... 2

**Titles.**—*See Mining-Claims.*
Digest of court decisions as to.... 524
How to examine..... 586
An unlawful entry cannot be justified by showing that the true, is outstanding..... 517
Parol sale formerly conveyed, in California..... 518
Conveyed by patent may be alienated to any person..... 6
Possession of public mineral lands is..... 516
The record of claim does not necessarily disclose..... 519
What the findings must show where, is based on possession... 518
The several forms of, a miner may have..... 239
Color of, effect in an attempted relocation..... 505
When party in possession is entitled to whole mine against one who has no title..... 518

**Title Paper.**
Penalty for falsely dating, in California..... 17

**Tools.**
Leaving, is presumption against abandonment ..... 488
Removing, is presumption of abandonment ..... 490

**Top.**—*See Apex.*

**Town Lot.**
Digest of court decisions relative to ..... 525
Mineral land cannot be taken and held exclusively as a, when..... 519
Question of fact between an owner of a, and a miner..... 525
Title to, in mining regions subject to mining rights..... 16
When delay for water will not hold a mining-claim against a... 525
When, is subject to mineral rights. 16

**Township Lines.**
There can be no school section

PAGE.
until, are run..... 101
So much of act of March 3, 1853, as prohibits survey of, only in mineral regions is repealed ..... 8
Township Plat.
Mineral claims, how designated on..... 39
Filing of D. S. in coal entries dependent on, in land-office..... 14
Coal claimant's declaratory statement as affected by filing of..... 72
Townsite.
Mining-claims are excepted from patent for..... 101
Mineral land can only be located under the mining laws without respect to its value for purposes of a..... 234
Lode-claims located prior to occupancy as a, may be patented without townsite reservation.... 328
Placer lands are not subject to, entry..... 324
If a placer-claim was located prior to the, no excepting clause should be inserted in the placer patent..... 232
Proceedings in, of Amador, California..... 101
A, cannot embrace coal lands...220, 339
Townsite Patent.
Excepting clause in, protecting mines..... 263
The excepting clause that is inserted in a..... 183
Title to coal veins does not pass by a..... 339
Transfer.—*See Conveyance—Sale.*
Trespass.
Digest of court decisions relative to..... 525
Trespasser.
When a re-locator is a..... 498
When a, cannot allege a defect in adverse location..... 395
Mere possession is good against a naked..... 413
Trustee.
A patentee may be declared, for the rightful owner..... 224
When a party can have patentee adjudged, for plaintiff..... 515
Tunnel.
Rights of owners of..... 3
Right of way for, how secured.... 520
Expenditures in running a, are credited on the lode or lodes developed..... 259
Annual expenditure may be made by running a..... 35
How blind lodes in a, are claimed.. 526
How a right to run a, may be protected..... 526
Amendatory act of February 11, 1875, relative to..... 24
Circular of March 5, 1875, relative to expenditures in running, to develop a lode..... 64
Where a, is partly owned by the claimant the expenditure therein may, in part, be counted on the claim applied for..... 218
Rights of A. Sutro for, to Comstock lode protected..... 12
Act of July 25, 1866, relative to Sutro..... 25
Tunnel Discovery.
An uncertain conveyance of a..... 495
Tunnel Line.
Is the width of the tunnel..... 90
The timber on the, belongs to the tunnel owner..... 222
A, is the width of the tunnel..... 230
Tunnel Location.
Rights included in a..... 3
What is an abandonment of..... 3
Form of..... 538
How a, is announced..... 231
Owners of a, must use diligence in working their tunnel..... 121
There is no specified amount necessary to hold a..... 122
Cannot be patented..... 99
Where work is abandoned for six months on a, the right to blind lodes is forfeited..... 222
Is required only where blind lodes are sought..... 301
Is a mining-claim and can be an adverse claim..... 318
Tunnel Lode.—*See Blind Lode.*
How surface ground for a, is ascertained..... 220
Proceedings when a, is discovered. 90
Tunnel Rights.
How acquired and maintained...35, 36
Amendatory act of February 11, 1875..... 24
Letter to J. B. Chaffee..... 90
Land-office rules concerning..... 35
Umber.
Deposits of, may be patented..... 161
Undivided Interest.
The owner of an, is entitled to possession when..... 518
Proceedings to secure patent in case of divided and..... 92
The substitution of another for a member withdrawn represents possession of the same..... 519
Union Pacific Railroad.
Lands containing valuable deposits of mica do not pass to the..... 182
Coal lands are granted to the..... 337

PAGE.
Where coal rights had attached to lands prior to definite location of, past the same, the tracts are excepted from the railroad grant 340
**Utah.**
Mining claims in, are real estate.. 511
A certain location in Ophir District, is not void for uncertainty. 158
Timber cutting in, authorized by Act of June 3, 1878..... 26
Liens on mines in..... 438
Every adverse-claim is meant in the statutes of..... 490
Local officers in, receive extra fees..... 16
Citizens of, may cut timber..... 26
Saline law of 1877 does not apply to..... 68
**Valuable Mineral Deposit.**
Definition of term..... 51
**Variations.**
Vein may be followed in its....2, 5, 19
**Vein.**—*See Lode.*
Definition of, how found in nature.....52, 352
Length and width of claim on, or lode..... 2
What is included in a location on a. 3
Locations are presumed to include the..... 506
Where one, intersects another, prior location is superior..... 10
The first patentee has the right to follow his, into adjoining land.. 93
Proceedings for patent for a placer-claim including a..... 9
Right to, discovered in a tunnel, how secured..... 3
Only one, could be patented with an application under act of 1866.....6, 19
Character of, to be certified by Surveyor-General.....5, 19
What assay is satisfactory evidence of discovery of..... 503
**Vein Claims.**
Description of, on surveyed and unsurveyed land..... 6
**Vendor.**
Purchaser takes only the title held by the..... 524
**Verdict.**
Effect of a certain jury's..... 524
**Verification.**
Of affidavits required under the mining acts..... 10
**Vested Rights.**
Possession in accordance with local laws gives..... 515
In a location, follow compliance with local laws..... 501
A valid location creates..... 511
Compensation should be paid for right of way over mines in view of..... 520
When a purchaser has complied with the law and secured the Register's certificate for his mine, he has..... 237
In water, shall be protected..... 11
**Waiver.**
A senior locator's silence is a, of his rights against a junior locator's application..... 352
While failure to prosecute diligently is a, of an adverse claim, diligence is a question for the court.....6, 243
A certain stipulation was a, of an adverse claim..... 146
**Washington Territory.**
Local officers in, receive extra fees..... 16
Citizens of, may cut timber..... 26
Saline law of 1877 does not apply to..... 68
Instructions under timber and stone act of 1878..... 65
Sale of timber lands in..... 27
**Water.**
Lode and, law of July 26, 1866... 18
Vested rights for use of, shall be protected..... 11
When delay for, will not protect a mine from a townsite claim... 525
A miner is entitled to, for his claim..... 523
How lost and appropriated..... 489
**Water Rights.**
Extent of..... 11
Under act of 1866..... 20
The local legislatures may enact laws to protect..... 79
A special clause is inserted in all patents in mining regions to protect..... 84
Clause in patent protecting easements and..... 79
Patents for timber lands subject to..... 27
Case of Jennison *vs.* Kirk..... 471
References in cases of Atchison *vs.* Peterson and Basey *vs.* Gallagher..... 478
**White Pine Laws.**
Location under the, defined..... 507
Annual expenditure under the..... 498
**Width.**
Of locations..... 507
Of claims on veins or lodes, how governed.....2, 33
Of Montana lode-claims under territorial law of 1864..... 194
**Wisconsin.**

PAGE.
Mineral lands in, to be sold by legal subdivisions.....13, 23
Withdrawal.
Of lands made by Secretary Delano revoked..... 56
Witnesses.—*See Evidence.*
There is no compulsion in securing, at hearings..... 74
Two, to posting of plat and field-notes on claim applied for..... 37
Statement of, as a location's bounds..... 506
Woman.
Locations can be made by a..... 221
Work.—*See Expenditure.*

PAGE.
Digest of court decisions in relation to..... 526
On a claim defined..... 526
Resumption of, defeats forfeiture when..... 505
Wyoming.
Local officers in, receive extra fees 16
Residents of, may cut timber..... 26
School sections in, containing coal..... 337
Timber cutting in, authorized by Act of June 3, 1878..... 26
Saline law of 1877 does not apply to..... 68

78

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